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Attorneys for Plaintiffs

**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

BENJAMIN SPIRO, LEAH SPIRO,
and STEPHANIE REBECCA
ANDRECS, individually and on behalf
of all others similarly situated,

Plaintiffs,

v.

EVERLYWELL, INC.,

Defendant.

Case No.

CLASS ACTION COMPLAINT

1. VIOLATION OF UNFAIR COMPETITION LAW (CAL. BUS. & PROF. CODE §§ 17200, *ET SEQ.*)
2. VIOLATION OF FALSE ADVERTISING LAW (CAL. BUS. & PROF. CODE §§ 17500, *ET SEQ.*)
3. VIOLATION OF CONSUMERS LEGAL REMEDIES ACT (CAL. CIV. CODE §§ 1750, *ET SEQ.*)
4. VIOLATION OF CALIFORNIA MEDICAL INFORMATION PRIVACY ACT (CAL. CIV. CODE §§ 56, *ET SEQ.*)
5. BREACH OF WARRANTY
6. UNJUST ENRICHMENT
7. FRAUD, DECEIT, AND/OR MISREPRESENTATION
8. NEGLIGENT MISREPRESENTATION

JURY TRIAL DEMANDED

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1 **COMPLAINT**

2 1. Plaintiffs Benjamin Spiro, Leah Spiro, and Stephanie Rebecca Andrecs
3 (“Plaintiffs”), individually and on behalf of all others similarly situated, bring this
4 class action complaint against Defendant Everlywell, Inc. (“Defendant”). Plaintiffs’
5 allegations are based upon personal knowledge, and upon information and belief as
6 to all other matters predicated upon the investigation conducted by and through
7 Plaintiffs’ attorneys.

8 **INTRODUCTION**

9 2. At a time when personal health and wellness have taken center stage,
10 products promising to unravel food sensitivities have become crucial for consumers
11 who want to understand and manage their dietary health. Yet companies like
12 Defendant misrepresent the capabilities of these products to boost their profits and
13 obtain an unfair advantage over lawful competitors. Defendant deceptively labels and
14 advertises its Immunoglobulin G (IgG) Food Sensitivity Test and its IgG Food
15 Sensitivity Comprehensive Test (collectively, the “Product”), promising consumers
16 that it can identify food sensitivities by measuring IgG antibody levels. But the
17 Product cannot deliver this benefit because IgG antibodies *cannot* detect food
18 sensitivities and simply act as a marker for food consumption.¹ Through its deceptive
19 practices, Defendant misleads consumers into chasing false positives, making
20 unnecessary dietary alterations, and paying a premium for a Product that does not
21 work. In addition, consumers unknowingly surrender their personal information to
22 Defendant under the guise of procuring valuable health insights, thereby raising
23 significant privacy concerns and potential for misuse of this sensitive data.

24 3. Defendant claims that its Product is a “Physician reviewed” and CLIA-
25 certified (Clinical Laboratory Improvement Amendments) test that measures IgG
26 antibody levels to identify food sensitivities. Defendant advertises that its IgG Food

27 ¹ *The Myth of IgG Food Panel Testing*, AM. ACAD. OF ALLERGY ASTHMA AND
28 IMMUNOLOGY, <https://www.aaaai.org/Tools-for-the-Public/Conditions-Library/Allergies/IgG-food-test> (last visited June 8, 2023).

1 Sensitivity Test can help consumers “[l]earn [their] reactivity to 96 foods that may be
2 causing discomfort,”² that its IgG Food Sensitivity Comprehensive Test can test “IgG
3 [r]eactivity to 204 [f]oods,”³ and that “higher than normal IgG reactivity level can
4 mean that there’s a possibility that food can be giving you symptoms,” such as
5 “headaches,” “gastrointestinal distress,” “bloating,” “indigestion,” and “stomach or
6 abdominal pain” (the “Challenged Representations”).⁴

7 4. The Challenged Representations have led Plaintiffs and other reasonable
8 consumers to erroneously believe that the Product can identify food sensitivities when
9 it cannot. Consequently, consumers are misled into avoiding certain foods
10 unnecessarily, potentially leading to nutritional deficiencies.

11 5. The Product cannot test food sensitivities as advertised because it checks
12 for IgG antibodies which, at most, only indicates to a consumer that they ate certain
13 food recently. Defendant knows this, and yet still markets its Product as a “Food
14 Sensitivity Test” which determines “reactivity” to foods. This deceives consumers
15 into believing that this test can determine which foods a consumer will react to, i.e.,
16 Defendant’s marketing deceptively indicates to consumers that the Product will
17 identify foods they may be sensitive to, despite the fact that IgG markers do not
18 identify sensitivities. Instead, the appropriate method to assess food sensitivity, which
19 includes intolerance or allergy, requires a physician or allergist to review a patient’s
20 comprehensive medical history before deciding whether to administer tests for
21 Immunoglobulin E (IgE) or Immunoglobulin A (IgA) antibodies, *not* IgG.

22 6. Through a pervasive statewide and nationwide marketing scheme of false,
23 misleading, and deceptive claims and promises, as well as omission of information
24 material to consumers’ purchasing decisions, Defendant exploits consumers’ desires

25 ² *Learn Your Reactivity to 96 Foods that May Be Causing You Discomfort*,
26 EVERLYWELL, <https://www.everlywell.com/products/food-sensitivity/> (last visited
June 8, 2023).

27 ³ *Try Our Most Extensive Food Sensitivity Test*, EVERLYWELL,
<https://www.everlywell.com/products/food-sensitivity-comprehensive-test/> (last
28 visited June 8, 2023).

⁴ *Id.*

1 for valuable health insights, while consumers merely receive a reflection of what they
2 consumed. Defendant realizes a financial windfall by advertising that the Product can
3 test for food sensitivity when it cannot. Defendant has benefitted at the expense of
4 unwitting consumers, as well as Defendant's lawfully acting competitors over whom
5 Defendant maintains an unfair competitive advantage.

6 7. In addition to selling an ineffective Product, Defendant retains the right
7 to sell and use private consumer data, including all information Defendant collects
8 and extracts from the blood samples mailed by consumers. When consumers submit
9 blood samples to test for "food sensitivities," they are entrusting Defendant with
10 intimate, material data that could be exploited if not handled with the utmost care.
11 Companies offering these tests, such as Defendant, often maintain comprehensive
12 databases of customer information, including personal identifiers and biological data
13 gleaned from blood samples.⁵ This collection of sensitive data not only exposes
14 customers to potential breaches of privacy but also raises ethical questions about the
15 use of such information for commercial purposes without explicit, informed consent.

16 8. Plaintiffs bring this class action complaint for two primary objectives.
17 First, Plaintiffs seek injunctive relief to stop Defendant's unlawful marketing of the
18 Product, while compelling it to clearly disclose how it collects, uses, and shares
19 consumers' personal data. Second, Plaintiffs seek on behalf of themselves and other
20 similarly situated consumers, a monetary recovery of the price premium consumers
21 overpaid for the Product, as consistent with permissible law (including, for example,
22 damages, restitution, disgorgement, and any applicable penalties/punitive damages
23 solely to the extent that those causes of action permit).

24 ⁵ For example, companies collecting DNA samples often store their customers' DNA,
25 and even offer this DNA to third parties, including law enforcement. *See What*
26 *Ancestry DNA Taught Me About DNA, Privacy, and the Complex World of Genetic*
Testing, CNET (Mar. 22, 2019), [https://www.cnet.com/science/ancestrydna-taught-](https://www.cnet.com/science/ancestrydna-taught-me-about-my-dna-privacy-and-the-complex-world-of-genetic-testing/)
27 [me-about-my-dna-privacy-and-the-complex-world-of-genetic-testing/](https://www.cnet.com/science/ancestrydna-taught-me-about-my-dna-privacy-and-the-complex-world-of-genetic-testing/)
28 ("FamilyTreeDNA, another huge provider of at-home DNA kits, had given the FBI
access to its database of over a million profiles. However, FamilyTree didn't notify
users that their genetic information might be used this way before giving the FBI
access.").

PARTIES

1
2 **9. Plaintiff Benjamin Spiro** alleges the following based on personal
3 knowledge: (1) Plaintiff is a resident of Los Angeles, California. (2) Plaintiff
4 purchased one IgG Food Sensitivity Comprehensive Test from Defendant’s website,
5 <http://www.everlywell.com>, for approximately \$155.40 on or around January 1, 2022.
6 (3) In making his purchase, Plaintiff relied on the Challenged Representations on the
7 Product’s label and website, and so he believed the Product could accurately test for
8 food sensitivities. (4) Plaintiff did not notice any statements on Defendant’s website
9 or the Product’s label that contradicted the Challenged Representations. (5) At the
10 time of purchase, Plaintiff did not know that the Product did not actually test for food
11 sensitivities. (6) Plaintiff would not have purchased the Product, or alternatively
12 would not have paid a premium for it, had Defendant not made the misrepresentations
13 and omissions set forth herein. Nor would Plaintiff have submitted his private
14 consumer data, or alternatively would have only submitted it under limited, restricted
15 conditions. (7) Plaintiff continues to see the Product available for sale and wants to
16 purchase the Product again if he can be sure the Product tests for food sensitivities.
17 (8) Plaintiff is not personally familiar with, nor does he possess any specialized
18 knowledge, experience, or education about testing for food sensitivities, so he cannot
19 determine if the Product functions as advertised. Accordingly, Plaintiff is at risk of
20 reasonably, but incorrectly, assuming that the Product actually tests for food
21 sensitivities. (9) Plaintiff is, and continues to be, unable to rely on Defendant’s
22 representations about whether the Product can deliver accurate results about food
23 sensitivities.

24 **10. Plaintiff Leah Spiro** alleges the following based on personal knowledge:
25 (1) Plaintiff is a resident of Los Angeles, California. (2) Plaintiff purchased one IgG
26 Food Sensitivity Comprehensive Test from Defendant’s website,
27 <http://www.everlywell.com>, for approximately \$155.40 on or around January 1, 2022.
28 (3) In making her purchase, Plaintiff relied on the Challenged Representations on the

1 Product's label and website, and so she believed the Product could accurately test for
2 food sensitivities. (4) Plaintiff did not notice any statements on Defendant's website
3 or the Product's label that contradicted the Challenged Representations. (5) At the
4 time of purchase, Plaintiff did not know that the Product did not actually test for food
5 sensitivities. (6) Plaintiff would not have purchased the Product, or alternatively
6 would not have paid a premium for it, had Defendant not made the misrepresentations
7 and omissions set forth herein. Nor would Plaintiff have submitted her private
8 consumer data, or alternatively would have only submitted it under limited, restricted
9 conditions. (7) Plaintiff continues to see the Product available for sale and wants to
10 purchase the Product again if she can be sure the Product tests for food sensitivities.
11 (8) Plaintiff is not personally familiar with, nor does she possess any specialized
12 knowledge, experience, or education about testing for food sensitivities, so she cannot
13 determine if the Product functions as advertised. Accordingly, Plaintiff is at risk of
14 reasonably, but incorrectly, assuming that the Product actually tests for food
15 sensitivities. (9) Plaintiff is, and continues to be, unable to rely on Defendant's
16 representations about whether the Product can deliver accurate results about food
17 sensitivities.

18 **11. Plaintiff Stephanie Rebecca Andrecs** alleges the following based on her
19 personal knowledge: (1) Plaintiff is a resident of Santa Monica, California. (2)
20 Plaintiff purchased one IgG Food Sensitivity Comprehensive Test from Defendant's
21 website, <http://www.everlywell.com>, for \$181.30 on or around March 8, 2021. (3) In
22 making her purchase, Plaintiff relied on the Challenged Representations on the
23 Product's label and website, and so she believed the Product could accurately test for
24 food sensitivities. (4) Plaintiff did not notice any statements on Defendant's website
25 or the Product's label that contradicted the Challenged Representations. (5) At the
26 time of purchase, Plaintiff did not know that the Product did not actually test for food
27 sensitivities. (6) Plaintiff would not have purchased the Product, or alternatively
28 would not have paid a premium for it, had Defendant not made the misrepresentations

1 and omissions set forth herein. Nor would Plaintiff have submitted her private
2 consumer data, or alternatively would have only submitted it under limited, restricted
3 conditions. (7) Plaintiff continues to see the Product available for sale and wants to
4 purchase the Product again if she can be sure the Product tests for food sensitivities.
5 (8) Plaintiff is not personally familiar with, nor does she possess any specialized
6 knowledge, experience, or education about testing for food sensitivities, and as such
7 cannot determine if the Product functions as advertised. Accordingly, Plaintiff is at
8 risk of reasonably, but incorrectly, assuming that the Product actually tests for food
9 sensitivities. (9) Plaintiff is, and continues to be, unable to rely on Defendant's
10 representations about whether the Product can deliver accurate results about food
11 sensitivities.

12 12. **Defendant Everlywell, Inc.** is a corporation headquartered in the state of
13 Texas where it also maintains its principal place of business. Defendant was doing
14 business in the state of California at all relevant times, including the Class Period.
15 Defendant is one of the owners, manufacturers, marketers, and/or distributors of the
16 Product, and is one of the companies that created, authorized, and controlled the use
17 of the Challenged Representations to market the Product. Defendant and its agents
18 promoted, marketed, and sold the Product throughout the United States and, in
19 particular, within this judicial district. The unfair, unlawful, deceptive, and misleading
20 Challenged Representations on the Product were prepared, authorized, ratified, and/or
21 approved by Defendant and its agents, and were disseminated throughout the United
22 States by Defendant and its agents to deceive and mislead consumers into purchasing
23 the Product.

24 13. Defendant also controls and manages sensitive consumer information.
25 Among other things, Defendant collects, stores, processes, and disseminates
26 consumer data, which it gathers through various channels such as online purchases,
27 user account registrations, marketing opt-ins, and blood samples. Defendant exercises
28 a high degree of control over this data, employing it not only for transactional

1 purposes but also for targeted marketing and advertising strategies. Defendant’s
2 handling of consumer information is key to its business operations and its methods of
3 promoting and selling products.

4 **JURISDICTION AND VENUE**

5 14. This Court has original jurisdiction over this action pursuant to the Class
6 Action Fairness Act of 2005, 28 U.S.C. § 1332(d), because the proposed Class
7 consists of 100 or more members; the amount in controversy exceeds \$5,000,000,
8 exclusive of costs and interest; and minimal diversity exists. This Court also has
9 supplemental jurisdiction over the state law claims pursuant to 28 U.S.C. § 1367.

10 15. Defendant is subject to personal jurisdiction in California based upon
11 sufficient minimum contacts which exist between Defendant and California.
12 Defendant is authorized to do and is doing business in California, and Defendant
13 advertises and solicits business in California. Defendant has purposefully availed
14 itself to the protections of California law and should reasonably expect to be hauled
15 into court in California for harm arising out of its pervasive contacts with California.

16 16. Venue is proper in this District under 28 U.S.C. § 1391 because a
17 substantial part of the events and omissions giving rise to Plaintiffs’ claims occurred
18 in this District. In addition, one or more Plaintiffs purchased the unlawful Product in
19 this District, and Defendant has marketed, advertised, and sold the Product within this
20 District using the Challenged Representations.

21 **FACTUAL ALLEGATIONS**

22 **A. Overview of “Food Sensitivity”**

23 17. **What is “Food Sensitivity?”** The term “food sensitivity” has no standard
24 medical definition and is often used as an umbrella term to encompass various
25 reactions to food, including “food allergies” and “food intolerances.” “Food
26 intolerances” are driven by the body’s inability to properly digest or process certain
27 foods, and the symptoms are generally less severe and normally limited to digestive
28

1 problems.⁶ In contrast, “food allergies” are typically characterized by immune system
 2 responses to specific food proteins, which can trigger mild to severe or even life-
 3 threatening symptoms.⁷ As explained *infra*, Plaintiffs and other reasonable consumers
 4 expected the Product labeled and advertised as a “Food Sensitivity” test to inform
 5 them of their food sensitivities, which includes food allergies and intolerances.

6 18. “Food allergies” are a manifestation of the immune system’s overreaction
 7 to certain food substances, which can be characterized into four types of
 8 hypersensitivity reactions. Each of these reactions involves different mechanisms,
 9 results in diverse symptoms, and is mediated by different components of the immune
 10 system. Of these, IgE-mediated reactions (e.g., the paradigmatic peanut allergy) are
 11 the most common. Only IgE, not its fellow immune antibodies IgA or IgG, which
 12 Defendant’s Product measures, is a reliable indicator of food allergies.⁸ IgE-mediated
 13 reactions result when an individual’s immune system, upon exposure to a particular
 14 food, falsely classifies the food as harmful and starts producing IgE immune
 15 antibodies to protect against future exposure.⁹

16 19. “Food intolerances”—a nonimmunologic response—is usually isolated to
 17 the gastrointestinal tract, occurring when an individual’s digestive system is unable
 18 to properly break down the food.¹⁰ Immune antibody tests, including Defendant’s IgG
 19 tests, cannot detect food intolerances. Food intolerance is rarely life-threatening but
 20 can be quite uncomfortable, with the severity of discomfort depending on how much
 21 of the food is consumed. People can often eat small amounts of the food without it

22
 23 ⁶ James T C Li, M.D., Ph.D., *Food allergy vs. food intolerance: What’s the*
 24 *difference?* <https://www.mayoclinic.org/diseases-conditions/food-allergy/expert-answers/food-allergy/faq-20058538> (last visited June 8, 2023).

25 ⁷ *Id.*

26 ⁸ Katheryn Birch, *Allergy Testing*, STATPEARLS (July 25, 2022),
 27 <https://www.ncbi.nlm.nih.gov/books/NBK537020/>.

28 ⁹ Food Allergy Research & Education (FARE), *Diagnosis of Food Allergies*,
 YOUTUBE (Feb. 22, 2023),
<https://www.youtube.com/watch?v=Yzaee2f8eXA&t=374s>.

¹⁰ *Food Intolerance vs. Food Allergy*, AM. ACAD. OF ALLERGY ASTHMA &
 IMMUNOLOGY (Sept. 28 2020), <https://www.aaaai.org/tools-for-the-public/conditions-library/allergies/food-intolerance>.

1 causing problems, which is categorically untrue of a food allergy.¹¹ Root causes of
 2 food intolerance include enzyme deficiencies, sensitivity to food additives, or
 3 reactions to naturally occurring chemicals in foods.¹²

4 **20. Reasonable Consumers’ Perception of “Food Sensitivity” Testing.** As
 5 stated above, “food sensitivity” is not an official medical diagnosis. Average
 6 consumers without a medical background understand the phrase to mean an
 7 intolerance to a food, or chronic, adverse reaction to a food, such as gastrointestinal
 8 distress, rashes, migraines, inflammation, or a worsening of another underlying
 9 condition. Defendant takes advantage of this understanding held by reasonable
 10 consumers by advertising the Product as a “Food Sensitivity Test” that can determine
 11 “reactivity” to certain foods. This is false and misleading because Defendant’s
 12 Product cannot determine if any given food is the actual or likely cause of any adverse
 13 reactions, such as food allergies or food intolerances. Instead, the Product merely
 14 measures the level of IgG antibodies in the blood, which are specific to the antigen
 15 (or food) that induced their production. In other words, the presence of IgG antibodies
 16 indicates that an individual’s body has been exposed to a certain food and has
 17 mounted an immune response to it.

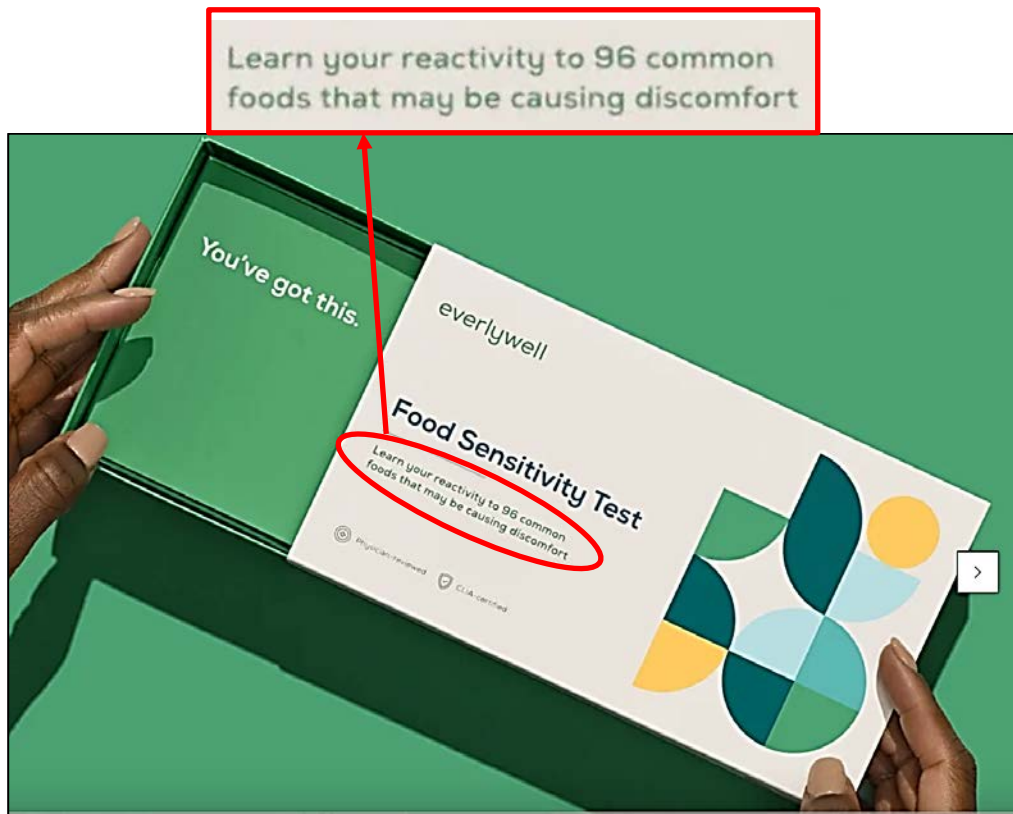
18 **B. Defendant’s False and Misleading Product Representations**

19 **21. Challenged Representations on the Product’s Label.** Defendant falsely
 20 and misleadingly labels the Product with the Challenged Representation: “[I]earn
 21 your reactivity to 96 [or 204] common foods that may be causing discomfort.” This
 22 Challenged Representation is conspicuous and prominently placed on the front of the
 23 Product’s packaging. The front primary display contains scant imagery and
 24 information about the Product, largely limited to the brand name (e.g., Everlywell)
 25 and type of test (e.g., Food Sensitivity Test). To draw the consumers’ attention, the
 26 Challenged Representation is written directly under the type of test in clear, legible,

27 _____
 28 ¹¹ *Id.*
¹² *Id.*

1 and highly visible green font, all of which starkly contrasts from the packaging’s
2 white background. The net-effect or net-impression on consumers is that the Product
3 will identify whether the subject has a “food sensitivity” to any of the 96 or 204 tested
4 foods. A fair and accurate depiction of the Product’s labels and packaging are depicted
5 in the Figures below.

6 **Figure 1.** Food Sensitivity Test Packaging (Front).



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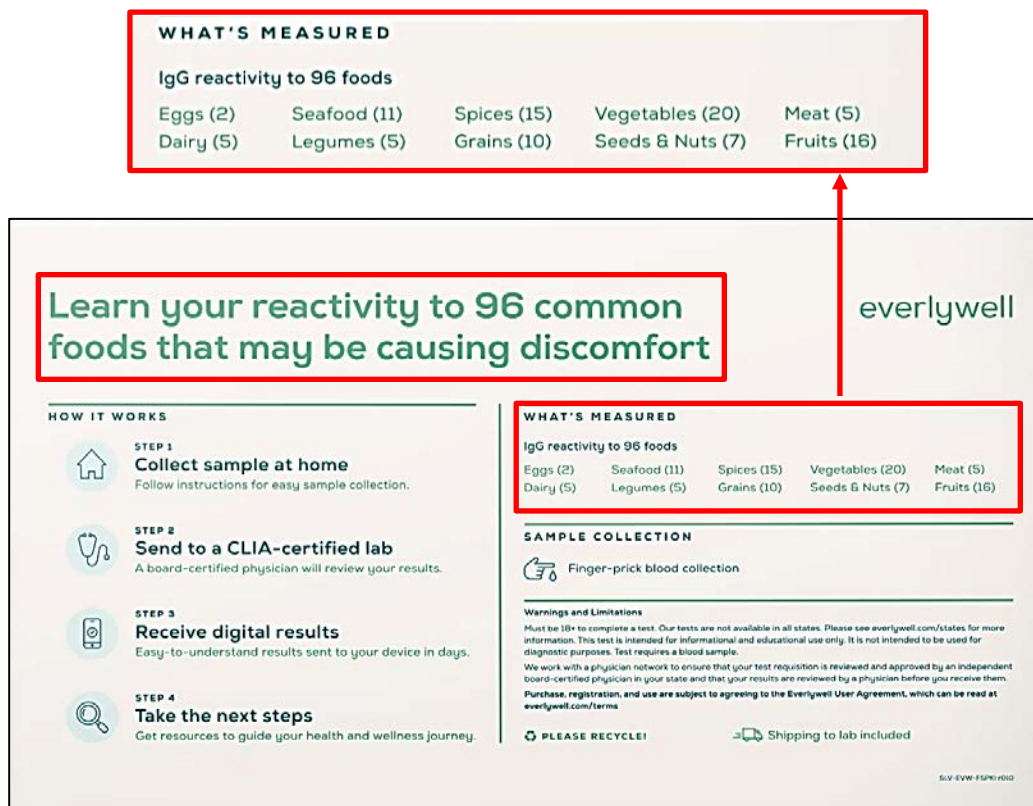
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1 **Figure 2.** Food Sensitivity Test Packaging (Back).



16 **Figure 3.** Food Sensitivity Comprehensive Test Packaging (Front).



1 **Figure 4.** Food Sensitivity Comprehensive Test Packaging (Back).

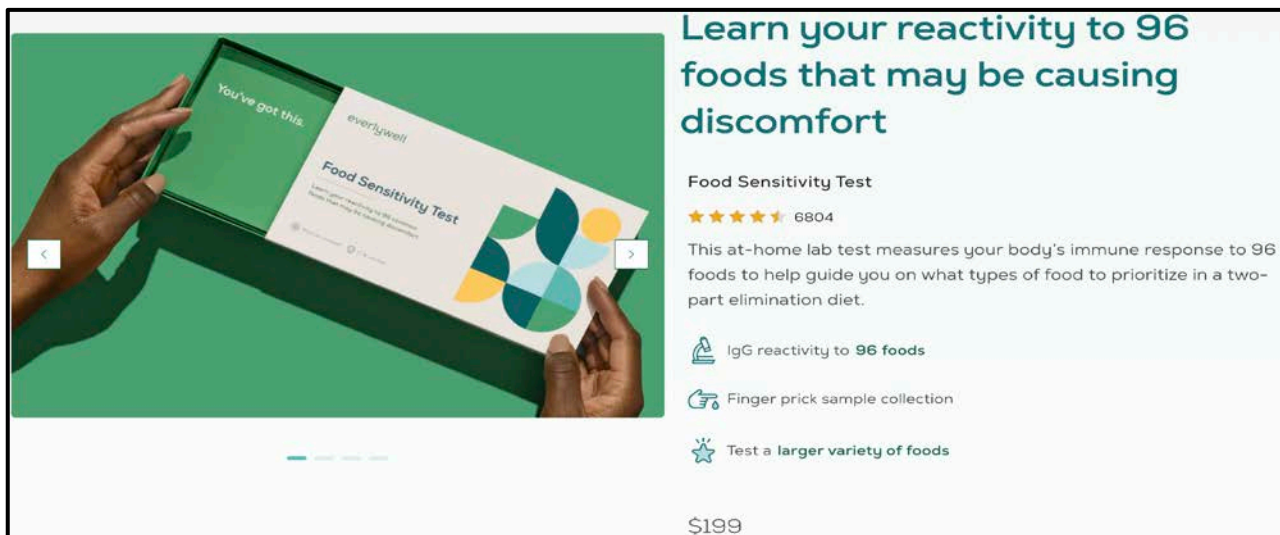


22. **Defendant’s Marketing.** Defendant deliberately designed and executed a marketing campaign to identify the Product as a “food sensitivity test.” The net impression of Defendant’s label and advertising is that the Product is a “food sensitivity test” that can help consumers “[l]earn [their] reactivity to 96 [or 204] common foods that may be causing discomfort,” and other symptoms. Defendant advertises its testing of “IgG reactivity to 96 [or 204] foods,” emphasizing that it tests a “larger variety of foods.” The Challenged Representations appear on the Product’s packaging and Defendant’s website, as well as Defendant’s social media accounts.

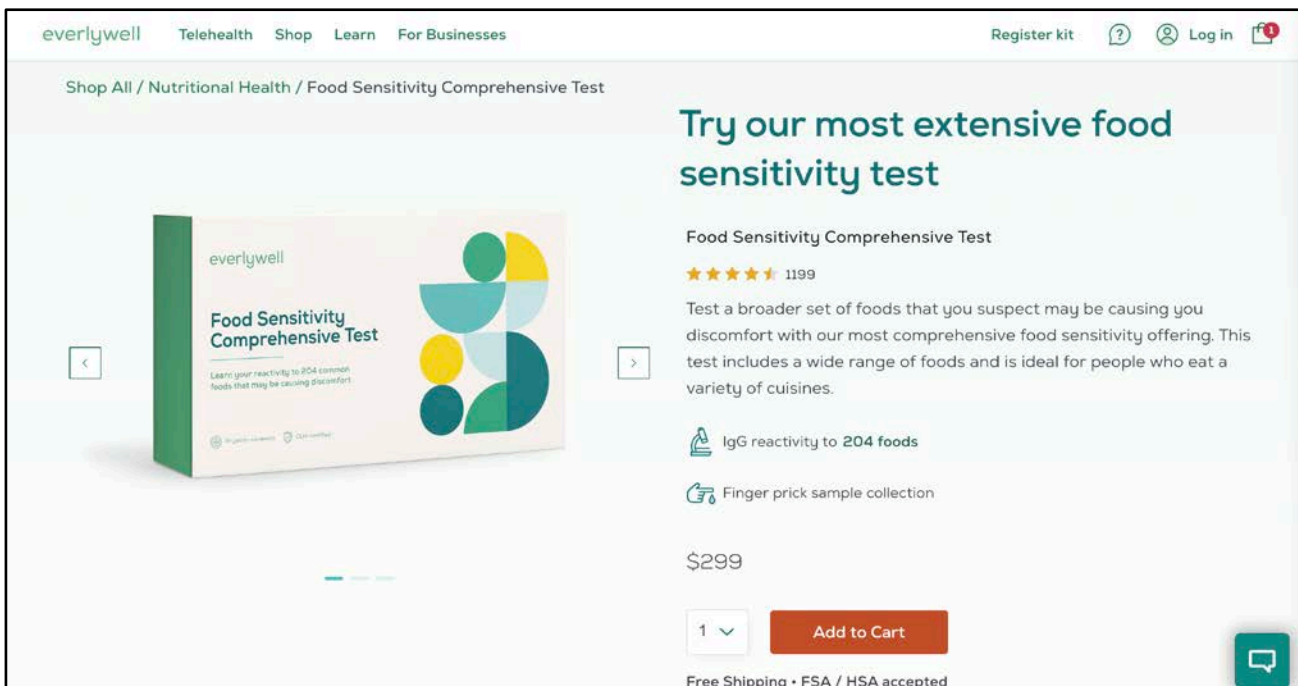
23. **Defendant’s Website.** As depicted below, Defendant’s website emphasizes that the Product allows consumers to “[l]earn [their] reactivity to 96 [or 204] foods that may be causing discomfort” in clear, legible, and highly visible green font. Defendant’s website further claims that a “higher than normal IgG reactivity level can mean that there’s a possibility that food can be giving you symptoms,” such as “headaches,” “gastrointestinal distress,” “bloating,” “indigestion,” and “stomach or abdominal pain.” In addition, Defendant claims the Product is “Physician

1 reviewed” and CLIA-certified (Clinical Laboratory Improvement Amendments).¹³

2 **Figure 5.** Product Advertising on Defendant’s Website.



12 **Figure 6.** Product Advertising on Defendant’s Website.



27 ¹³ *Learn Your Reactivity to 96 Foods that May Be Causing You Discomfort*,
28 EVERLYWELL, <https://www.everlywell.com/products/food-sensitivity/> (last visited June 8, 2023).

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Figure 7. Defendant’s Description of Food Sensitivity Test on its Website.

	Food Sensitivity Test	Celiac Disease Screening Test ▶	Food Allergy Test ▶
Measures	Current levels of IgG antibodies for a variety of foods	Presence or absence of antibodies that can indicate celiac disease	IgE reactivity to common food allergens
Intended use	To identify foods in your current diet that might be connected to food sensitivity symptoms	To identify if you have an immune response to gluten, that might be connected to celiac disease	To identify antibody responses to specific foods that might be connected to a food allergy
Potential symptoms	Food sensitivities are a non-life-threatening condition with delayed symptoms such as: <ul style="list-style-type: none"> • Abdominal pain • Bloating • Headache • Indigestion 	Celiac disease is an autoimmune condition with chronic symptoms such as: <ul style="list-style-type: none"> • Abdominal pain, diarrhea, constipation • Bloating • Unexpected weight loss 	Food Allergies are a potentially life threatening condition with symptoms that can develop quickly such as: <ul style="list-style-type: none"> • Abdominal pain, nausea, diarrhea, constipation • Hives or skin rash • Runny nose, sneezing, congestion • Tingling or itching
Next steps	Helps guide a two-part elimination diet	Provides results to share with your healthcare provider	Provides results to share with your healthcare provider

Figure 8. Defendant’s Description of Food Sensitivity Comprehensive Test on its Website.

	Food Sensitivity Comprehensive Test	Celiac Disease Screening Test ▶	Food Allergy Test ▶
Measures	Current levels of IgG antibodies for a variety of foods	Presence or absence of antibodies that can indicate celiac disease	IgE reactivity to common food allergens
Intended use	To identify foods in your current diet that might be connected to food sensitivity symptoms	To identify if you have an immune response to gluten, that might be connected to celiac disease	To identify antibody responses to specific foods that might be connected to a food allergy
Potential symptoms	Food sensitivities are a non-life-threatening condition with delayed symptoms such as: <ul style="list-style-type: none"> • Abdominal pain • Bloating • Headache • Indigestion 	Celiac disease is an autoimmune condition with chronic symptoms such as: <ul style="list-style-type: none"> • Abdominal pain, diarrhea, constipation • Bloating • Unexpected weight loss 	Food Allergies are a potentially life threatening condition with symptoms that can develop quickly such as: <ul style="list-style-type: none"> • Abdominal pain, nausea, diarrhea, constipation • Hives or skin rash • Runny nose, sneezing, congestion • Tingling or itching
Next steps	Helps guide a two-part elimination diet	Provides results to share with your healthcare provider	Provides results to share with your healthcare provider

1 **Figure 9.** Defendant’s CLIA-Certified Label on Defendant’s Website.



5 **Figure 10.** Related Symptoms of Food Sensitivity Identified on Defendant's Website



11 **24. Social Media Representations.** Defendant continually uses deceptive
12 labeling and marketing techniques to falsely portray its Product’s purported abilities
13 and benefits, taking advantage of social media platforms. For example:

- 14 a. **Twitter.** As depicted below, Defendant regularly creates public posts,
15 including consumer testimonials, to advertise and promote its Product on
16 its official Twitter page as a “Food Sensitivity Test,” while omitting the
17 fact that the Product cannot detect nonimmunologic food reactivity.¹⁴

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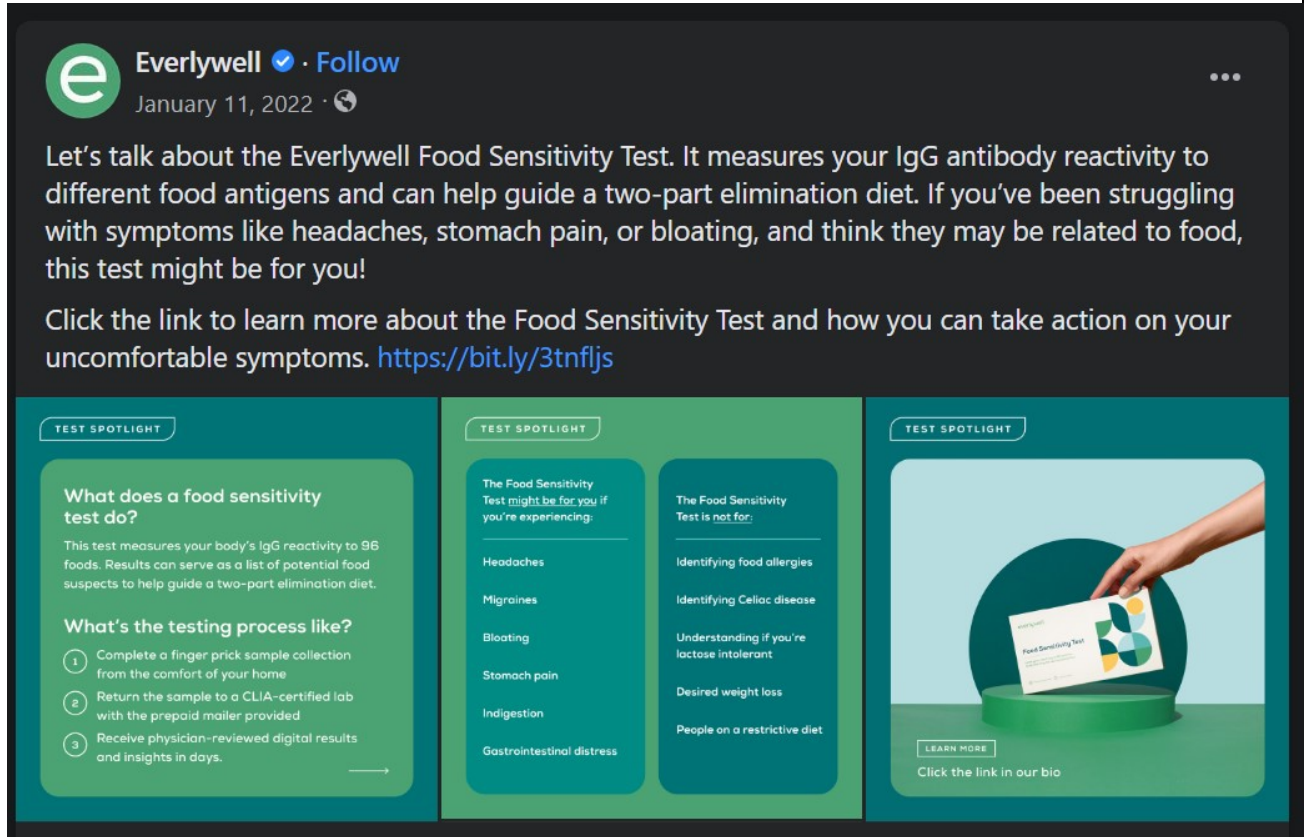
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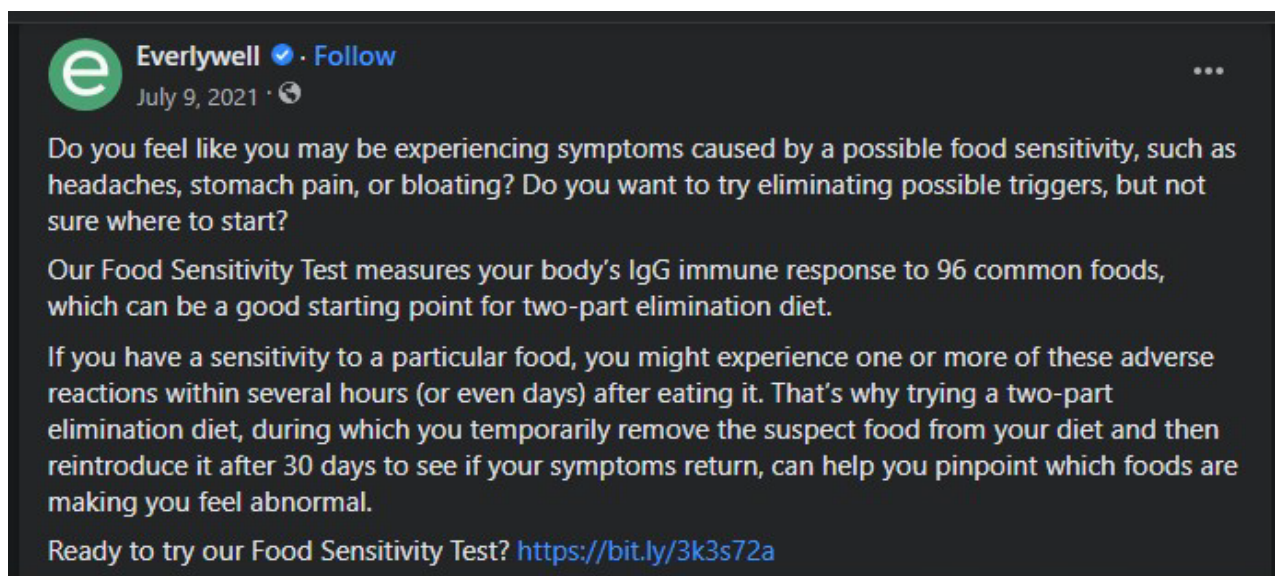
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27 _____
28 ¹⁴ See @Everlywell, TWITTER, https://twitter.com/everly_well (last visited June 8, 2023).

1 **Figure 11.** Defendant’s Public Post on Twitter No. 1.

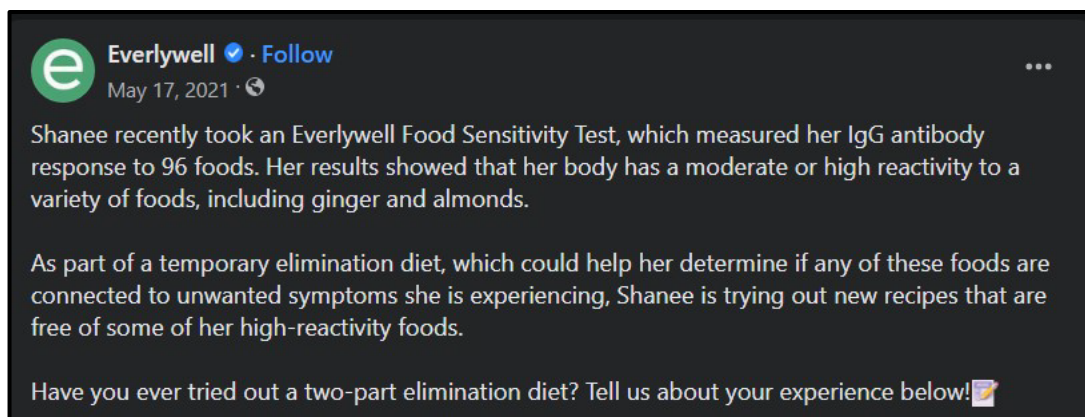


15 **Figure 12.** Defendant’s Public Post on Twitter No. 2.



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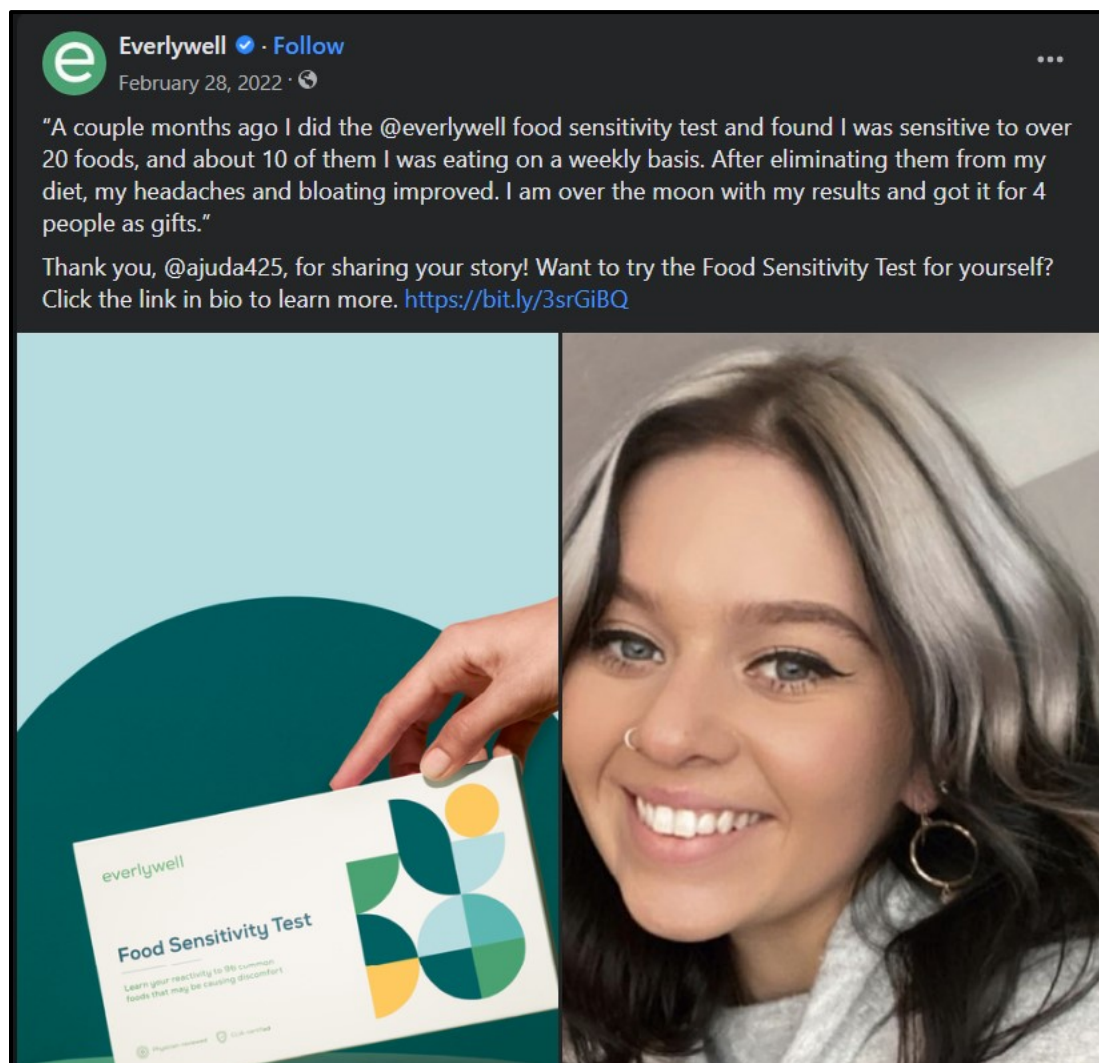
1 **Figure 13.** Customer Testimonial Posted by Defendant No. 1.



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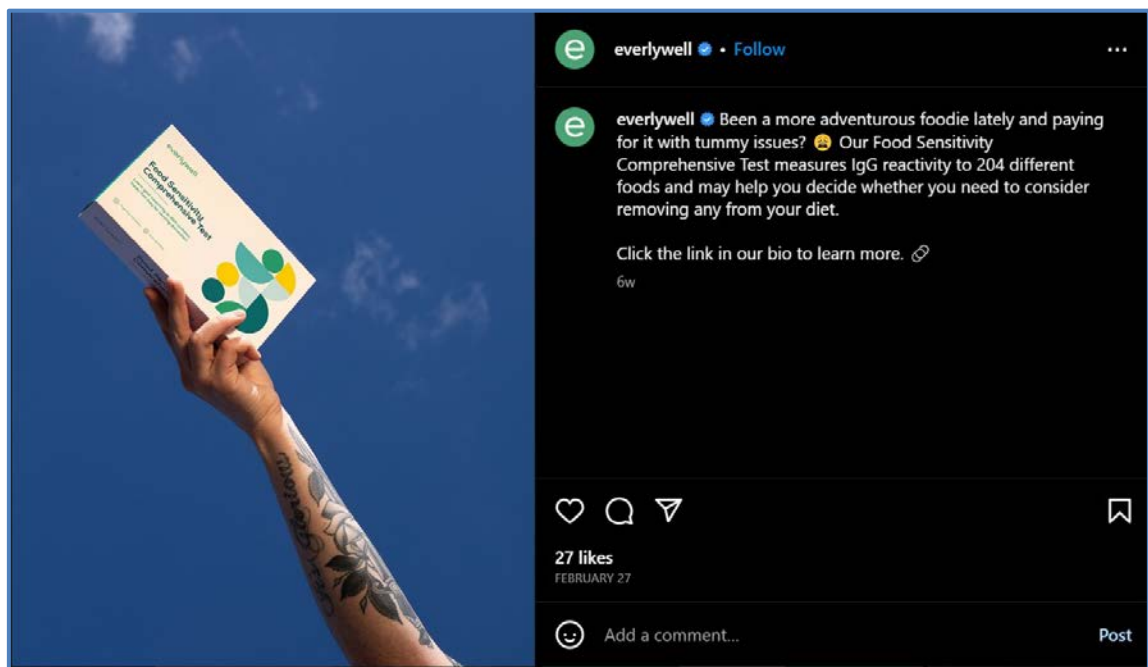
9

10 **Figure 14.** Customer Testimonial Posted by Defendant No. 2.



1 b. **Instagram.** Defendant also leverages its Instagram platform to market the
 2 Product as a “Food Sensitivity Test,” conveniently omitting that its IgG
 3 tests are incapable of detecting nonimmunologic food reactivity.
 4 Defendant’s Product may detect higher levels of IgG antibodies not
 5 because a consumer is allergic to that food, but rather because their
 6 immune system has built a tolerance to it due to repeated exposure (i.e., a
 7 consumer frequently eats the food). Such tolerance does not indicate an
 8 allergy, but rather indicates the body is simply exposed to that particular
 9 food.¹⁵ Defendant’s Product has no way of detecting or analyzing whether
 10 the heightened IgG levels stem from an adverse food sensitivity.

11 **Figure 15.** Screenshot of Defendant’s Public Post on Instagram.



23 25. **The Product Cannot Deliver the Advertised Benefits.** Defendant’s
 24 Product tests for immune antibody IgG levels, which cannot detect “food allergies”
 25 nor “food sensitivities.” Defendant claims that testing for IgG levels in response to
 26 “96 [or 204] common foods” tests for “food sensitivity” by claiming that a “higher

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28 ¹⁵ See @everlywell, INSTAGRAM, <https://www.instagram.com/everlywell/> (last visited June 8, 2023).

1 than normal IgG reactivity level can mean that there's a possibility that food can be
 2 giving you symptoms, such as "headaches," "gastrointestinal distress," "bloating,"
 3 "indigestion," and "stomach or abdominal pain."¹⁶ Contrary to Defendant's
 4 advertising scheme, heightened levels of IgG are not indicative of sensitivity to
 5 certain foods; instead, they merely reflect the test subject's frequently eaten foods.¹⁷
 6 IgE, not IgG, is the only reliable indicator of food allergies.¹⁸ Research has shown
 7 that IgG levels actually increase as the severity of an allergy (measured by IgE levels)
 8 decreases.¹⁹ Further, immune antibody tests, including Defendant's IgG tests, cannot
 9 detect nonimmunologic food intolerances, yet the symptoms that Defendant's Product
 10 is marketed to alleviate are commonly associated with food intolerance.

11 **26. The Scientific Community Has Universally Rejected IgG Testing for**
 12 **Food Sensitivities.** In late 2022, Defendant published a response to allegations that
 13 its advertising of the Product is deceptive in a New York Times article titled *Is Food*
 14 *Sensitivity a Scam?* The response is not persuasive. Defendant pointed to studies
 15 where researchers found that eliminating high-IgG foods reduces symptoms like
 16 abdominal pain and bloating, but these cited studies were small and "lacked proper
 17 control groups."²⁰ In actuality, both the American Academy of Allergy, Asthma &
 18 Immunology (AAAAI), which is a leading membership organization of
 19 allergists/immunologists with more than 7,000 members in the United States, Canada,
 20 and 72 other countries, and the Canadian Society of Allergy and Clinical Immunology

23 ¹⁶ *Learn Your Reactivity to 96 Foods That May be Causing You Discomfort*,
 24 EVERLYWELL, <https://www.everlywell.com/products/food-sensitivity/> (last visited
 June 8, 2023).

25 ¹⁷ *Id.*

26 ¹⁸ Katheryn Birch, *Allergy Testing*, STATPEARLS (July 25, 2022),
<https://www.ncbi.nlm.nih.gov/books/NBK537020/>.

27 ¹⁹ Vanessa Milne et al., *IgG tests promise to reveal food sensitivities. But are they*
science or science-ish?, HEALTHYDEBATE (Jan. 6, 2017),
<https://healthydebate.ca/2017/01/topic/igg-tests-science/>.

28 ²⁰ Alice Callahan, *Is Food Sensitivity Testing a Scam?*, N.Y. TIMES (Sep. 21, 2022),
<https://www.nytimes.com/2022/09/13/well/eat/food-sensitivity-test.html>.

1 (CSACI) have condemned IgG testing.²¹ According to the AAAAI website:

2 The scientific studies that are provided to support the use of this
 3 test are often out of date, in non-reputable journals and many have
 4 not even used the IgG test in question. **The presence of IgG is**
 5 **likely a normal response of the immune system to exposure to**
 6 **food. In fact, higher levels of IgG to foods may simply be**
 7 **associated with tolerance to those foods.**²²

8 The CSACI position echoes the same sentiment, adding, “the inappropriate use of this
 9 test only increases the likelihood of false diagnoses being made, resulting in
 10 unnecessary dietary restrictions and decreased quality of life.”²³ Thus, Defendant’s
 11 Product cannot deliver on its label and advertising claims. Testing for IgG immune
 12 antibodies, as the Product advertises, does not accomplish the Product’s stated goals,
 13 and overall cannot test for food sensitivities (whether food intolerance or allergies).

14 **C. In Addition to its False and Misleading Product Claims, Defendant**
 15 **Also Profits from the Collection and Use of Consumers’ Personal**
 16 **Data**

17 27. When consumers like Plaintiffs purchase the Product, they not only end
 18 up wasting their money on a test kit that offers no value but also do not know the
 19 extensive collection and misuse of private information.

21 ²¹ See *The Myth of IgG Food Panel Testing*, AM. ACAD. OF ALLERGY, ASTHMA &
 22 IMMUNOLOGY, [https://www.aaaai.org/tools-for-the-public/conditions-](https://www.aaaai.org/tools-for-the-public/conditions-library/allergies/igg-food-test)
 23 [library/allergies/igg-food-test](https://www.aaaai.org/tools-for-the-public/conditions-library/allergies/igg-food-test) (last visited June 8, 2023); *AAAAI support of the*
 24 *EAACI Position Paper on IgG4*, AM. ACAD. OF ALLERGY, ASTHMA & IMMUNOLOGY
 25 (May 2010), [https://www.aaaai.org/Aaaai/media/Media-Library-](https://www.aaaai.org/Aaaai/media/Media-Library-PDFs/Tools%20for%20the%20Public/Conditions%20Library/Library%20-%20Allergies/eacci-igg4-2010.pdf)
 26 [PDFs/Tools%20for%20the%20Public/Conditions%20Library/Library%20-](https://www.aaaai.org/Aaaai/media/Media-Library-PDFs/Tools%20for%20the%20Public/Conditions%20Library/Library%20-%20Allergies/eacci-igg4-2010.pdf)
 27 [%20Allergies/eacci-igg4-2010.pdf](https://www.aaaai.org/Aaaai/media/Media-Library-PDFs/Tools%20for%20the%20Public/Conditions%20Library/Library%20-%20Allergies/eacci-igg4-2010.pdf); Stuart Carr et al., *CSACI Position statement on*
 28 *the testing of food-specific IgG*, 8 ALLERGY, ASTHMA, & CLINICAL IMMUNOLOGY
 (Jul. 26, 2012), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3443017/>.

²² *The Myth of IgG Food Panel Testing*, AM. ACAD. OF ALLERGY, ASTHMA &
 IMMUNOLOGY, [https://www.aaaai.org/tools-for-the-public/conditions-](https://www.aaaai.org/tools-for-the-public/conditions-library/allergies/igg-food-test)
[library/allergies/igg-food-test](https://www.aaaai.org/tools-for-the-public/conditions-library/allergies/igg-food-test) (last visited June 8, 2023) (emphasis added).

²³ Stuart Carr et al., *CSACI Position statement on the testing of food-specific IgG*, 8
 ALLERGY, ASTHMA, & CLINICAL IMMUNOLOGY (Jul. 26, 2012),
<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3443017/>.

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28. Defendant gathers the following information²⁴:
- a. Legal name, postal address, unique personal identifier, online identifiers, Internet protocol address, signature, email address, phone number, account name or other similar identifiers;
 - b. Financial information – such as credit card, debit card or other payment data;
 - c. Commercial information – including products purchased (or even considered, but not purchased), as well as other purchasing trends/tendencies;
 - d. All available internet activity – including browsing history, search history, electronic network information, response to advertisements/form submissions, all available engagement data for the individual purchasers or nonpurchases/visitors of Defendant’s websites;
 - e. Geolocation data;
 - f. All available professional/employment information;
 - g. Inferences drawn from individuals’ profiles, including but not limited to consumers’ preferences, characteristics, psychological trends, predispositions, behavior, attitudes, intelligence abilities, and aptitudes;
 - h. Driver’s license number, citizenship status, immigration status, race, national origin, sexual orientation, sex life, precise geolocation, information concerning one’s health, their genetic information;
 - i. Personally identifiable health information, medical information, and health records.

29. However, as fully explained below, Defendant does not apprise its customers of the vast amount of data it collects on each unsuspecting individual purchaser.

²⁴ *Privacy Notice*, EVERLYWELL, <https://www.everlywell.com/privacy-policy/> (last visited June 8, 2023).

1 30. Even more troubling, Defendant shares this highly sensitive consumer
2 data with numerous other entities – service providers, marketing and promotional
3 partners, affiliates, Meta Platforms, external and internal clients, business partners,
4 and many other unauthorized third party entities.

5 31. Undoubtedly, Defendant also acquires tremendous data from the blood
6 samples of consumers. Upon information and belief, this highly sensitive and valuable
7 information may be sold by Defendant to pharmaceutical companies or other so-
8 called “partners” to profit from consumers’ private and sensitive information.

9 32. Defendant does not disclose the extent of its data collection and misuse
10 in a clear and conspicuous manner to consumers. Instead, Defendant surreptitiously
11 hides this information, and also fails to disclose the full extent of the uses of one’s
12 personal data.

13 33. **Defendant Failed to Present Its Privacy Policy in a Clear and**
14 **Conspicuous Manner.** Defendant’s Privacy Policy is not prominently displayed,
15 easily accessible, or clearly visible on the main pages of its website. Instead, users are
16 required to search extensively and navigate through multiple links to find it. This lack
17 of visibility prevents reasonable consumers like Plaintiffs from being adequately
18 informed about the personal information they will need to provide to Defendant to
19 obtain the test results, and how that information will be used.

20 34. When consumers purchase the Product from Defendant’s website, just
21 like Plaintiffs did, consumers are not required to click on any hyperlink or read
22 through the Privacy Policy or Terms and Conditions as depicted further below. A
23 purchase is made instantaneously the moment a consumer clicks “Place Order.” No
24 additional steps are in place to prompt consumers to review and give their explicit
25 consent to Defendant’s Privacy Policy or Terms and Conditions prior to their
26 purchase—notwithstanding the breadth of information Defendant collects and shares
27 with its “partners” and “marketing entities.”

28 35. Furthermore, the available chat features on Defendant's website, and other

1 distractions, hinder important pieces of information, like the link to Defendant’s
2 Privacy Policy.

3 36. Following the purchase, consumers are requested to register the Product
4 on Defendant’s website to *receive* their tests results. At no point are they required to
5 agree to or even view Defendant’s Privacy Policy and Terms and Conditions.
6 Notably, when a consumer is completing the registration process, Defendant states
7 that the consumer is going to be subject to additional terms and conditions, viewable
8 only by visiting a separate webpage on the website. However, at no point in this
9 process are consumers forced to read any terms and conditions. Consumers must
10 merely click a box indicating their assent to the terms.

11 37. Moreover, Defendant uses prompts such as “Proceed to Checkout” or
12 “Place Order” instead of any clear indication that by purchasing the Product,
13 consumers are accepting Defendant’s terms and conditions nor agreeing to
14 Defendant’s Privacy Policy. As such, at no point do consumers understand or agree
15 to any inconspicuous terms or misuse of their personal information.

16 38. It is only after they have bought the Product that consumers may discover
17 the extent of collection and misuse of personal data. This lack of transparency leaves
18 consumers uninformed and deceived about the full extent of their engagement with
19 Defendant’s Product and services.

20 39. **Concealed Intention to Use and Sell Consumer Data.** Defendant
21 conceals its intention to use and sell consumer data from consumers. Although
22 Defendant asserts on its website that it is “HIPAA compliant,” uses “state-of-the-art,
23 bank-grade encryption to ensure [consumer’s] data is stored securely,” and “under no
24 circumstance do we ever sell [consumer’s] data,” the details of its Privacy Notice—
25 accessible only through a small, inconspicuous link at the bottom of its website—
26 reveal multiple scenarios under which it may share consumer information with third
27
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1 parties for business purposes.²⁵ Reasonable consumers would not willingly provide a
2 for-profit company with their private medical information and other personally
3 identifiable details, especially when that company holds the right to utilize and sell
4 such information for unrelated commercial purposes. This is particularly true in cases
5 like this one where a company offers no valuable medical services or information, nor
6 any form of payment or benefit in exchange for the consumer’s private information.

7 **Figure 16.** Defendant’s Privacy Policy on its Website.²⁶

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²⁵ *Learn your reactivity to 96 foods that may be causing discomfort*, Everlywell, <https://www.everlywell.com/products/food-sensitivity/> (last visited June 8, 2023).

²⁶ *Privacy Notice*, EVERLYWELL, <https://www.everlywell.com/privacy-policy/> (last visited June 8, 2023).

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Type of Information	Sources of Information	Business or Commercial Purposes for Collection	Disclosed for a Business Purpose	Third Parties to Whom Disclosed for Business Purpose
Identifiers such as legal name, postal address, unique personal identifier, online identifier, Internet Protocol address, signature, email address, phone number, account name, or other similar identifiers	Direct contact with users through the Platforms, phone, email, web form and social media	As described below, e.g., to provide you with products and services and for internal purposes	Yes	Service providers, marketing and promotional partners, affiliates and other entities that provide a service directly to you
Financial information such as credit card number or debit card number and address or other information related to a billing or payment transaction	Direct contact with users through the Platforms, phone, email and social media; from subsidiaries and affiliates and third parties	As described below, e.g., to provide you with products, schedule an appointment, or complete transactions, and for internal purposes	Yes	Service providers and affiliates
Commercial information, including products or services purchased, obtained, or considered, or other purchasing or consuming histories or tendencies	Platforms, cookies and other tracking technologies, third parties and affiliates such as service providers	As described below, e.g., for internal and marketing purposes	Yes	Service providers, analytics, marketing, and promotional partners
Internet or other electronic network activity information, including, but not limited to, browsing history, search history, and information regarding a consumer's interaction with an Internet Web site, application, form submissions, email unsubscribes and subscribes, email engagement or advertisement	Platforms (websites, mobile applications, interactive features, social media networks, and other services) that link to this Notice	As described below regarding cookies, e.g., for internal purposes and for marketing purposes, as described in our Cookie Notice .	Yes	Service providers, analytics, marketing, and promotional partners
Geolocation data	Platforms; e.g. to provide nearby pharmacy or service locations	As described below regarding cookies, e.g., for internal, marketing, and other operational and business purposes	Yes	Service providers, marketing and promotional partners, third parties for operational purposes
Inferences drawn from any personal information collected to create a profile about a consumer reflecting the consumer's preferences, characteristics, psychological trends, predispositions, behavior, attitudes, intelligence, abilities, and aptitudes	Direct contact with users through the Platforms, phone, email and social media; cookies and other tracking technologies, third parties and affiliates such as service providers	As described below, in order to facilitate more targeted marketing, as well as for internal reporting and analytics purposes	Yes	Service providers, marketing and promotional partners, third parties for operational purposes
Professional or employment-related information	Direct contact with users through the Platforms, phone, email and social media and from service providers assisting in filling open positions	To process applications for potential employment and for internal employment and benefit purposes	Yes	Service providers; where permitted or with consent, with third parties such as future employers or pursuant to legal requestService providers, third parties for operational purposes
Everly or Natalist employee information, including employee identification number, identifiers and address details, contact information, employment details, job location, financial or payroll related information, other potentially sensitive personal information including National or State Identification Numbers for various employment-related purposes or background checks, and dependent information for the administration of certain employee benefits or programs	Direct contact through the Platforms, phone, email and social media with Everly or Natalist employees and any third-party employee recruitment sources	To conduct background checks and for other purposes in the ordinary course of employment (e.g., to facilitate onboarding processes, manage compensation, provide benefits, review performance, etc.)	Yes	Service providers, third parties for operational purposes
Sensitive personal information, including driver's license number, national or state identification number, citizenship status, immigration status, race, national origin, religious or philosophical beliefs, sexual orientation, sex life, precise geolocation, information concerning your health, and genetic information	Direct contact through the Platforms, phone, email and social media with users and Everly or Natalist employees	Internal reporting and analytics purposes, for other purposes in the ordinary course of employment, and to facilitate more targeted marketing	Yes	Service providers, analytics, marketing, and promotional partners, and third parties for operational purposes

1 40. Moreover, Defendant’s HIPAA Notice of Privacy Practices provides that
2 Defendant may disclose consumers’ protected health information (“PHI”), without
3 requiring consumers’ authorization, in numerous circumstances including but not
4 limited to “treatment, payment and healthcare operations purposes, as such terms are
5 defined under HIPAA, or to the extent required by law.”²⁷

6 41. Defendant does not disclose the abovementioned privacy terms on the
7 front or the back of the Product package. Nor does it disclose it in its social media or
8 require third-party retailers to disclose it. Instead, Defendant prominently advertises
9 that it is HIPAA compliant. As such, consumers are not put on notice that there are
10 additional terms which govern the transaction, nor are they put on notice that
11 Defendant will store consumer data for Defendant’s use and sale.

12 42. It is only after a consumer purchases Defendant's Product, in order to
13 receive test results, that they may finally discover privacy terms. However, even then,
14 consumers will not likely understand the true extent of harm and potential misuse of
15 their data. This is intentional on the part of Defendant. Defendant will not accept or
16 refund opened but unused kits, and so to the extent a consumer opens their kit,
17 registers online, and then sees the privacy policy and feels uncomfortable about
18 providing their personal data to Defendant, it will be too late. At that point, the best a
19 consumer can do is dispose of the kit and simply lose their money on the transaction.
20 There is no option for a consumer to get the results of their test without sending in
21 their blood sample and accepting the terms that Defendant pushes upon them.

22 43. **Inadequate Disclosure of Policies for In-Person Product Purchases.**
23 If a consumer purchased the Product from a third-party retailer or in-person, the
24 consumer would not have access to the aforementioned Privacy Policy and HIPAA
25 Notice of Privacy Practices until they register the Product on Defendant’s website to
26 receive their test results—which could be days or months following the purchase.

27 _____
28 ²⁷ *HIPAA Notice of Privacy Practices*, EVERLYWELL,
<https://www.everlyhealth.com/hipaa-notice/> (last visited June 8, 2023).

1 44. The personal consumer data submitted by consumers to Defendant holds
2 significant market potential. Through its misleading marketing and sale of the
3 Product, Defendant has amassed blood samples from potentially millions of
4 individuals. These samples can be (and are likely exploited by Defendant) for a wide
5 array of commercial purposes. For example, these blood samples can be sold to
6 companies for research and development purposes, to insurance companies looking
7 to assess a person's health, or even sold to third-party marketers or advertisers who
8 can then target a consumer with personalized advertisements related to health
9 products, services, or treatments. The cost of acquiring a similar trove of information
10 would be massive. While consumers may charitably donate to blood banks, it is
11 unreasonable to expect that they would freely offer blood samples, linked to their
12 private and identifiable information, to a profit-driven venture like Defendant.

13 45. In addition to Defendant's usage of consumers' personal data to develop
14 their own products, collection of such personal data also serves as an asset Defendant
15 now holds which can be sold to others for profit. Such data can be sold to third parties,
16 including government agencies, for a virtually limitless number of commercial uses.
17 Overall, Defendant's retention of personal data is done in an exceedingly vast and
18 overbroad manner, and no reasonable consumer is put on notice of this, and no
19 reasonable consumer would assent to this scheme if they were made fully aware of
20 Defendant's practices.

21 **D. Plaintiffs and Reasonable Consumers Were Misled by the**
22 **Challenged Representations into Buying the Product, to Their**
23 **Detriment, Consistent with Defendant's Deliberate Marketing**
24 **Scheme to Exact a Premium for the Falsely Advertised Product**

25 46. **Reasonable Consumer's Perception.** The Challenged Representations,
26 combined with Defendant's pervasive marketing campaign and brand strategy, lead
27 reasonable consumers, like Plaintiffs, into believing the Products could help them
28 learn about their food sensitivities.

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1 47. **No Clear and Conspicuous Disclaimers Dispel the Deception.** Nothing
2 on the Product’s label or packaging would lead reasonable consumers to believe that
3 the Challenged Representations are not true. That is because the Product’s label and
4 packaging do not contain a clear, unambiguous, and conspicuously displayed
5 statement, reasonably proximate to the Challenged Representations, that reasonable
6 consumers are likely to notice, read, and understand to mean that the Challenged
7 Representations are indeed false.

8 48. **Materiality.** The Challenged Representations are material to reasonable
9 consumers, including Plaintiffs, in deciding to buy the Product—meaning that
10 whether the Product can deliver on advertised claims is important to consumers and
11 motivates them to buy the Product.

12 49. **Reliance.** The Class, including Plaintiffs, reasonably relied on the
13 Challenged Representations in deciding to purchase the Product.

14 50. **Falsity.** The Challenged Representations are false and deceptive because
15 the Product cannot deliver on the advertised claim—meaning the Product is incapable
16 of determining consumers’ sensitivities to certain foods; instead, they merely reflect
17 the test subject’s frequently eaten foods. As depicted below, Defendant admitted in a
18 public post on Twitter that the Product is not intended to “reflect food allergies,
19 lactose intolerance, or celiac disease.”²⁸ However, nowhere on the package or
20 webpage does Defendant disclose that the Product may only measure a normal
21 biological reaction or otherwise suggest to consumers that the Product is incapable of
22 identifying food sensitivities.

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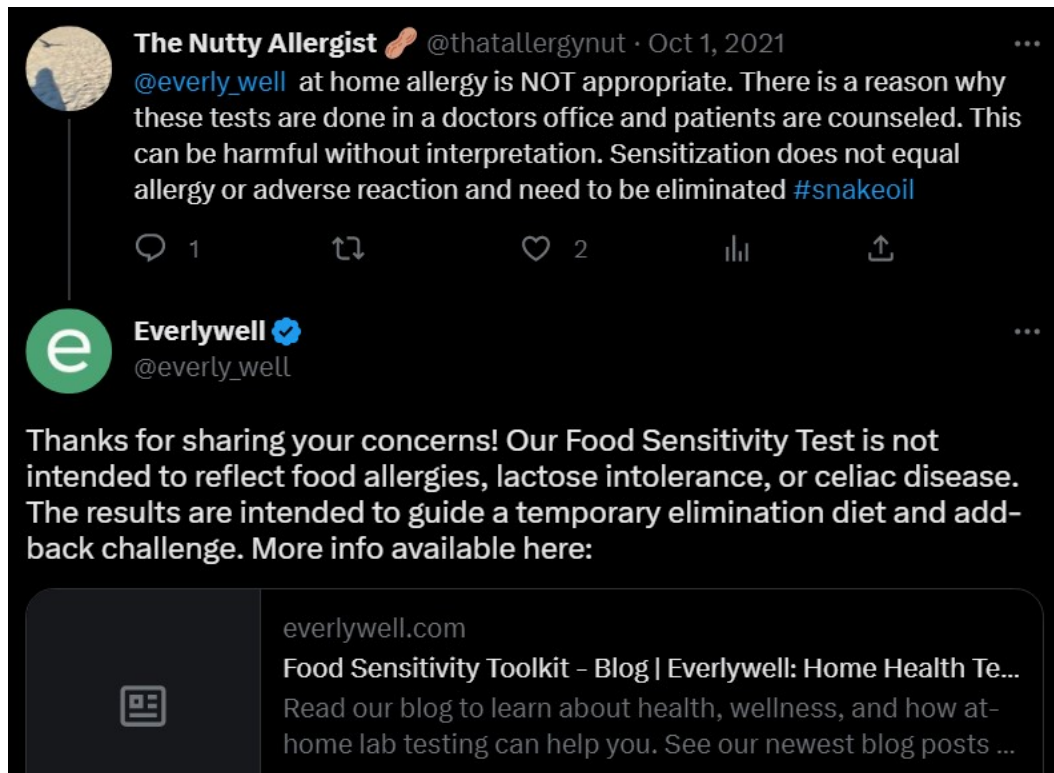
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28 ²⁸ @Everlywell, TWITTER, https://twitter.com/everly_well (last visited June 8, 2023).

1 **Figure 17.** Screenshot of Defendant’s Reply on Twitter.



15 **51. Consumers Lack Knowledge of Falsity.** The Class, including Plaintiffs,
 16 who purchased the Product, do not know, and have no reason to know, at the time of
 17 purchase, that the Product’s Challenged Representations are false, misleading,
 18 deceptive, and unlawful—that is because the Class, including Plaintiffs, do not work
 19 for Defendant and have no personal knowledge of how food sensitivity testing works.

20 **52. Defendant’s Knowledge.** Defendant knew, or should have known, that
 21 the Challenged Representations were false, misleading, deceptive, and unlawful, at
 22 the time that Defendant manufactured, marketed, advertised, labeled, and sold the
 23 Product using the Challenged Representations to Plaintiffs and the Class.

24 a. **Knowledge of Falsity.** Defendant is well aware that its Product is
 25 worthless as it fails to deliver the promised health or educational benefit
 26 and is even dangerous in that it may suggest adverse food sensitivities
 27 resulting in unhealthy diet modification. Defendant has even publicly
 28 recognized that the AAAAI recommends against using its Product to

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1 identify food sensitivities, but Defendant remains undeterred.²⁹

2 b. **Knowledge of Reasonable Consumers' Perception.** Defendant knew or
3 should have known that the Challenged Representations would lead
4 reasonable consumers into believing that the Product is able to deliver on
5 the advertised claims. Not only has Defendant utilized a long-standing
6 brand strategy to advertise that the Product determines and informs
7 consumers regarding their food sensitivities to 96 or 204 foods to help
8 guide consumers on what types of food to prioritize, but Defendant also
9 has an obligation under section 5 of the Federal Trade Commission Act,
10 codified at 15 U.S.C. §§ 45, to evaluate its marketing claims from the
11 perspective of the reasonable consumer. That means Defendant was
12 statutorily obligated to consider whether the Challenged Representations,
13 be it in isolation or conjunction with its marketing campaign, would
14 mislead reasonable consumers into believing that the Product can identify
15 consumer food sensitivities to 96 or 204 foods. Thus, Defendant either
16 knew the Challenged Representations are misleading before it marketed
17 the Product to the Class, including Plaintiffs, or Defendant should have
18 known about the deception had it complied with its statutory obligations.

19 c. **Knowledge of Materiality.** Defendant knew or should have known of
20 the Challenged Representations' materiality to consumers. First,
21 manufacturers and marketers, like Defendant, generally reserve the front
22 primary display panel of labels or packaging on consumer products for
23 the most important and persuasive information, which they believe will
24 motivate consumers to buy the products. Here, the conspicuousness of the
25 Challenged Representations on the Product's front labels and packaging

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27 ²⁹ Shayla Love, *Food Intolerance Tests Are Shoddy Science and Traps for*
28 *Disordered Eating*, VICE MAG., (Feb. 23, 2018),
<https://www.vice.com/en/article/43778n/food-intolerance-tests-are-shoddy-science-and-traps-for-disordered-eating>.

1 demonstrates Defendant's awareness of its importance to consumers and
2 Defendant's understanding that consumers prefer and are motivated to
3 buy products that conform to the Challenged Representations. Second,
4 manufacturers and marketers repeat marketing claims to emphasize and
5 characterize a brand or product line, shaping the consumers' expectations,
6 because they believe those repeated messages will drive consumers to buy
7 the Product. Here, the constant, unwavering use of the Challenged
8 Representations on the Product, advertisements, and throughout
9 Defendant's marketing campaign, evidence Defendant's awareness that
10 the falsely advertised Product-attribute is important to consumers. It also
11 evidences Defendant's intent to convince consumers that the Product
12 conforms to the Challenged Representations and, ultimately, drive sales.

13 **d. Defendant's Continued Deception, Despite Its Knowledge.** Defendant,
14 as the manufacturer and marketer of the Product, had exclusive control
15 over the Challenged Representations' inclusion on the Product's front
16 labels, packaging, and advertisements—i.e., Defendant readily and easily
17 could have stopped using the Challenged Representations to sell the
18 Product. However, despite Defendant's knowledge of the Challenged
19 Representations' falsity, and Defendant's knowledge that consumers
20 reasonably rely on the representations in deciding to buy the Product,
21 Defendant deliberately chose to market the Product with the Challenged
22 Representations thereby misleading consumers into buying or overpaying
23 for the Product. Thus, Defendant knew, or should have known, at all
24 relevant times, that the Challenged Representations mislead reasonable
25 consumers, such as Plaintiffs, into buying the Product to attain the
26 benefits that Defendant falsely advertised and warranted.

27 53. **Detriment.** Plaintiffs and similarly situated consumers would not have
28 purchased the Product, or would not have a price premium for the Product, if they had

1 known that the Challenged Representations were false and, therefore, the Product
2 does not have the attribute claimed, promised, warranted, advertised, and/or
3 represented. Nor would Plaintiffs have submitted their personal and private
4 information, or alternatively would have only submitted it under limited, restricted
5 conditions. Accordingly, based on Defendant’s material misrepresentations and
6 omissions, reasonable consumers, including Plaintiffs, purchased the Product to their
7 detriment.

8 **E. The Products are Substantially Similar**

9 54. As described herein, Plaintiffs purchased Defendant’s Food Sensitivity
10 Comprehensive Test. The additional Product, the Food Sensitivity Test, is
11 substantially similar to the purchased Product for the following reasons:

- 12 a. **Defendant.** All Products are manufactured, sold, marketed, advertised,
13 labeled, and packaged by Defendant.
- 14 b. **Brand.** All Products are sold under the same brand name: Everlywell.
- 15 c. **Purpose.** All Products allegedly test and inform consumers of their food
16 sensitivities as to certain foods.
- 17 d. **Marketing Demographics.** All Products are marketed directly to
18 consumers for personal use. In particular, the Products are manufactured
19 as testing kits to collect blood samples and provide results about the
20 reactivity to certain foods.
- 21 e. **Challenged Misrepresentation.** All Products contain the same
22 Challenged Representation (“[l]earn your reactivity to 96 [or 204]
23 common foods that may be causing discomfort”) conspicuously and
24 prominently placed on the primary display panel of the front label,
25 packaging and website.
- 26 f. **Packaging.** All Products are packaged in similar packaging—using
27 similar color schemes for written content. The Products largely share the
28 same marketing claims written on the box, including brand identity

1 (Everlywell), description (“Food Sensitivity Test”), and a few product
2 features (e.g., the Products include the same materials within the box, and
3 have the same logo, font, and design on the packaging).

4 g. **Misleading Effect.** The misleading effect of the Challenged
5 Representation on consumers is the same for all Products—consumers
6 over-pay a premium to test their food sensitivities but receive results
7 reflecting only what they have been eating recently.

8 **F. No Adequate Remedy at Law**

9 55. Plaintiffs and members of the Class are entitled to equitable relief as no
10 adequate remedy at law exists.

11 a. **Broader Statutes of Limitations.** The statutes of limitations for the
12 causes of action pled herein vary. The limitations period is four years for
13 claims brought under the UCL, which is one year longer than the statutes
14 of limitation under the FAL and CLRA. In addition, the statutes of
15 limitation vary for certain states’ laws for breach of warranty and unjust
16 enrichment/restitution, between approximately 2 and 6 years. Thus,
17 California Subclass members who purchased the Product more than 3
18 years prior to the filing of the complaint will be barred from recovery if
19 equitable relief were not permitted under the UCL. Similarly, Nationwide
20 Class members who purchased the Product prior to the furthest reach-
21 back under the statutes of limitation for breach of warranty, will be barred
22 from recovery if equitable relief were not permitted for restitution/unjust
23 enrichment.

24 b. **Broader Scope of Conduct.** In addition, the scope of actionable
25 misconduct under the unfair prong of the UCL is broader than the other
26 causes of action asserted herein. It includes, for example, Defendant’s
27 overall unfair marketing scheme to promote and brand the Product with
28 the Challenged Representations, across a multitude of media platforms,

1 including the Product's labels and packaging, over a long period of time,
2 in order to gain an unfair advantage over competitor products and to take
3 advantage of consumers' desires for products that comport with the
4 Challenged Representations. The UCL also creates a cause of action for
5 violations of law (such as statutory or regulatory requirements and court
6 orders related to similar representations and omissions made on the type
7 of products at issue). Thus, Plaintiffs and Class members may be entitled
8 to restitution under the UCL, while not entitled to damages under other
9 causes of action asserted herein (e.g., the FAL requires actual or
10 constructive knowledge of the falsity; the CLRA is limited to certain
11 types of plaintiffs (an individual who seeks or acquires, by purchase or
12 lease, any goods or services for personal, family, or household purposes)
13 and other statutorily enumerated conduct). Similarly, unjust
14 enrichment/restitution is broader than breach of warranty. For example,
15 in some states, breach of warranty may require privity of contract or pre-
16 lawsuit notice, which are not typically required to establish unjust
17 enrichment/restitution. Thus, Plaintiffs and Class members may be
18 entitled to recover under unjust enrichment/restitution, while not entitled
19 to damages under breach of warranty, because they purchased the
20 products from third-party retailers or did not provide adequate notice of a
21 breach prior to the commencement of this action.

22 **c. Injunctive Relief to Cease Misconduct and Dispel Misperception.**

23 Injunctive relief is appropriate on behalf of Plaintiffs and members of the
24 Class because Defendant continues to misrepresent the Product with the
25 Challenged Representations. Injunctive relief is necessary to prevent
26 Defendant from continuing to engage in the unfair, fraudulent, and/or
27 unlawful conduct described herein and to prevent future harm—none of
28 which can be achieved through available legal remedies (such as

1 monetary damages to compensate past harm). Further, injunctive relief,
2 in the form of affirmative disclosures is necessary to dispel the public
3 misperception about the Products that has resulted from years of
4 Defendant's unfair, fraudulent, and unlawful marketing efforts. Such
5 disclosures would include, but are not limited to, publicly disseminated
6 statements that the Product's Challenged Representations are not true and
7 providing accurate information about the Product's true nature; and/or
8 requiring prominent qualifications and/or disclaimers on the Product's
9 front labels concerning the Product's true nature. An injunction requiring
10 affirmative disclosures to dispel the public's misperception and to prevent
11 the ongoing deception and repeat purchases based thereon, is also not
12 available through a legal remedy (such as monetary damages). In
13 addition, Plaintiffs are *currently* unable to accurately quantify the
14 damages caused by Defendant's future harm, because discovery and
15 Plaintiffs' investigation have not been completed, rendering injunctive
16 relief even more necessary. For example, because the Court has not yet
17 certified any class, the following remains unknown: the scope of the class,
18 the identities of its members, their respective purchasing practices, prices
19 of past/future Product sales, and quantities of past/future Product sales.

20 d. **Public Injunction.** Further, because a "public injunction" is available
21 under the UCL, damages will not adequately "benefit the general public"
22 in a manner equivalent to an injunction.

23 e. **California vs. Nationwide Class Claims.** Violation of the UCL, FAL,
24 and CLRA are claims asserted on behalf of Plaintiffs and the California
25 Subclass against Defendant, while breach of warranty and unjust
26 enrichment/restitution are asserted on behalf of Plaintiffs and the
27 Nationwide Class. Dismissal of farther-reaching claims, such as
28 restitution, would bar recovery for non-California members of the Class.

1 In other words, legal remedies available or adequate under the California-
 2 specific causes of action (such as the UCL, FAL, and CLRA) have no
 3 impact on this Court's jurisdiction to award equitable relief under the
 4 remaining causes of action asserted on behalf of non-California putative
 5 class members.

6 **f. Procedural Posture—Incomplete Discovery & Pre-Certification.**

7 Lastly, this is an initial pleading in this action and discovery has not yet
 8 commenced and/or is at its initial stages. No class has been certified yet.
 9 No expert discovery has commenced and/or completed. The completion
 10 of fact/non-expert and expert discovery, as well as the certification of this
 11 case as a class action, are necessary to finalize and determine the
 12 adequacy and availability of all remedies, including legal and equitable,
 13 for Plaintiffs' individual claims and any certified class or subclass.
 14 Plaintiffs therefore reserve their right to amend this complaint and/or
 15 assert additional facts that demonstrate this Court's jurisdiction to order
 16 equitable remedies where no adequate legal remedies are available for
 17 either Plaintiffs and/or any certified class or subclass. Such proof, to the
 18 extent necessary, will be presented prior to the trial of any equitable
 19 claims for relief and/or the entry of an order granting equitable relief.

20 **CLASS ACTION ALLEGATIONS**

21 56. **Class Definition.** Plaintiffs bring this action pursuant to Federal Rule of
 22 Civil Procedure 23 on behalf of themselves and as members of the Classes defined as
 23 follows:

24 **Nationwide Class.** All residents of the United States who, within
 25 the applicable statute of limitations periods, purchased the
 26 Product, containing the Challenged Representations, for
 purposes other than resale; and

27 **California Subclass.** All residents of California who, within
 28 four years prior to the filing of this Complaint, purchased the
 Product, containing the Challenged Representations, for
 purposes other than resale.

1 (“Nationwide Class” and “California Subclass,” collectively,
2 “Class”).

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4 57. **Class Definition Exclusions.** Excluded from the Class are: (i) Defendant,
5 its assigns, successors, and legal representatives; (ii) any entities in which Defendant
6 has controlling interests; (iii) federal, state, and/or local governments, including, but
7 not limited to, their departments, agencies, divisions, bureaus, boards, sections,
8 groups, counsels, and/or subdivisions; and (iv) any judicial officer presiding over this
9 matter and person within the third degree of consanguinity to such judicial officer.

10 58. **Reservation of Rights to Amend the Class Definition.** Plaintiffs reserve
11 the right to amend or otherwise alter the class definition presented to the Court at the
12 appropriate time in response to facts learned through discovery, legal arguments
13 advanced by Defendant, or otherwise.

14 59. **Numerosity.** Members of the Class are so numerous that joinder of all
15 members is impracticable. Upon information and belief, the Nationwide Class
16 consists of tens of thousands of purchasers (if not more) dispersed throughout the
17 United States, and the California Subclass likewise consists of thousands of
18 purchasers (if not more) dispersed throughout California. Accordingly, it would be
19 impracticable to join all members of the Class before the Court.

20 60. **Common Questions Predominate.** There are numerous and substantial
21 questions of law or fact common to all members of the Class that predominate over
22 any individual issues. Included within the common questions of law or fact are:

- 23 a. Whether Defendant engaged in unlawful, unfair or deceptive business
24 practices by advertising and selling the Product;
25 b. Whether Defendant’s conduct of advertising and selling the Product
26 constitutes an unfair method of competition, or unfair or deceptive act or
27 practice, in violation of Civil Code section 1750, *et seq.*;
28 c. Whether Defendant used deceptive representations in connection with the

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- sale of the Product in violation of Civil Code section 1750, *et seq.*;
- d. Whether Defendant represented that the Product has characteristics or quantities that it does not have in violation of Civil Code section 1750, *et seq.*;
 - e. Whether Defendant advertised the Product with intent not to sell it as advertised in violation of Civil Code section 1750, *et seq.*;
 - f. Whether Defendant’s labeling and advertising of the Product are untrue or misleading in violation of Business and Professions Code section 17500, *et seq.*;
 - g. Whether Defendant knew or by the exercise of reasonable care should have known its labeling and advertising was and is untrue or misleading in violation of Business and Professions Code section 17500, *et seq.*;
 - h. Whether Defendant’s conduct is an unfair business practice within the meaning of Business and Professions Code section 17200, *et seq.*;
 - i. Whether Defendant’s conduct is a fraudulent business practice within the meaning of Business and Professions Code section 17200, *et seq.*;
 - j. Whether Defendant’s conduct is an unlawful business practice within the meaning of Business and Professions Code section 17200, *et seq.*;
 - k. Whether Plaintiffs and the Class paid more money for the Product than they actually received;
 - l. How much more money Plaintiffs and the Class paid for the Product than they actually received;
 - m. Whether Defendant’s practices violated California’s Confidentiality of Medical Information Act, Civil Code section 56, *et seq.*;
 - n. Whether Defendant’s conduct constitutes breach of warranty;
 - o. Whether Defendant’s conduct constitutes fraud, deceit, and/or misrepresentation;
 - p. Whether Defendant’s conduct constitutes a negligent misrepresentation;

- q. Whether Defendant was unjustly enriched by its unlawful conduct; and
- r. Whether Plaintiffs and the Class are entitled to injunctive relief.

61. **Typicality.** Plaintiffs’ claims are typical of the claims of the Class Members they seek to represent because Plaintiffs, like the Class Members, purchased Defendant’s misleading and deceptive Products. Defendant’s unlawful, unfair and/or fraudulent actions concern the same business practices described herein irrespective of where they occurred or were experienced. Plaintiffs and the Class sustained similar injuries arising out of Defendant’s conduct. Plaintiffs’ and Class Members’ claims arise from the same practices and course of conduct and are based on the same legal theories.

62. **Adequacy.** Plaintiffs are adequate representatives of the Class they seek to represent because their interests do not conflict with the interests of the Class Members Plaintiffs seek to represent. Plaintiffs will fairly and adequately protect Class Members’ interests and have retained counsel experienced and competent in the prosecution of complex class actions, including complex questions that arise in consumer protection litigation.

63. **Superiority and Substantial Benefit.** A class action is superior to other methods for the fair and efficient adjudication of this controversy, since individual joinder of all members of the Class is impracticable and no other group method of adjudication of all claims asserted herein is more efficient and manageable for at least the following reasons:

- a. The claims presented in this case predominate over any questions of law or fact, if any exist at all, affecting any individual member of the Class;
- b. Absent a Class, the members of the Class will continue to suffer damages and Defendant’s unlawful conduct will continue without remedy while Defendant profits from and enjoy its ill-gotten gains;
- c. Given the size of individual Class Members’ claims, few, if any, Class Members could afford to or would seek legal redress individually for the

1 reference all allegations contained in this complaint, as though fully set forth herein.

2 **68. California Subclass.** This cause of action is brought pursuant to Business
3 and Professions Code Section 17200, *et seq.*, on behalf of Plaintiffs and a California
4 Subclass who purchased the Product within the applicable statute of limitations.

5 **69. The UCL.** California Business & Professions Code, sections 17200, *et*
6 *seq.* prohibits unfair competition and provides, in pertinent part, that “unfair
7 competition shall mean and include unlawful, unfair or fraudulent business practices
8 and unfair, deceptive, untrue or misleading advertising.”

9 **70. False Advertising Claims.** Defendant, in its advertising and packaging
10 of the Product, made false and misleading statements and fraudulent omissions
11 regarding the quality and characteristics of the Product. Such claims and omissions
12 appear on the label and packaging of the Product, which are sold at retail stores and
13 online.

14 **71. Defendant’s Deliberately False and Fraudulent Marketing Scheme.**
15 Defendant does not have any reasonable basis for the claims about the Product made
16 in Defendant’s advertising and on Defendant’s packaging or labeling because the
17 Product cannot test for food sensitivities. Defendant knew and knows that the
18 Products cannot test for food sensitivities, though Defendant intentionally advertised
19 and marketed the Products to deceive reasonable consumers into believing that
20 Product could perform as advertised.

21 **72. False Advertising Claims Cause Purchase of Product.** Defendant’s
22 labeling and advertising of the Product led to, and continues to lead to, reasonable
23 consumers, including Plaintiffs, believing that the Products can test for food
24 sensitivities.

25 **73. Injury in Fact.** Plaintiffs and the California Subclass have suffered injury
26 in fact and have lost money or property as a result of and in reliance upon Defendant’s
27 false advertising claims—namely Plaintiffs and the California Subclass lost the
28 purchase price for the Product they bought from Defendant.

1 74. **Conduct Violates the UCL.** Defendant’s conduct, as alleged herein,
2 constitutes unfair, unlawful, and fraudulent business practices pursuant to the UCL.
3 The UCL prohibits unfair competition and provides, in pertinent part, that “unfair
4 competition shall mean and include unlawful, unfair or fraudulent business practices
5 and unfair, deceptive, untrue or misleading advertising.” Cal. Bus & Prof. Code §
6 17200. In addition, Defendant’s use of various forms of advertising media to
7 advertise, call attention to, or give publicity to the sale of goods or merchandise that
8 are not as represented in any manner constitutes unfair competition, unfair, deceptive,
9 untrue or misleading advertising, and an unlawful business practice within the
10 meaning of Business and Professions Code Sections 17200 and 17531, which
11 advertisements have deceived and are likely to deceive the consuming public, in
12 violation of Business and Professions Code Section 17200.

13 75. **No Reasonably Available Alternatives/Legitimate Business Interests.**
14 Defendant failed to avail itself of reasonably available, lawful alternatives to further
15 its legitimate business interests.

16 76. **Business Practice.** All of the conduct alleged herein occurred and
17 continues to occur in Defendant’s business. Defendant’s wrongful conduct is part of
18 a pattern, practice and/or generalized course of conduct, which will continue daily
19 until Defendant voluntarily alters its conduct or Defendant is otherwise ordered to do
20 so.

21 77. **Injunction.** Pursuant to Business and Professions Code Sections 17203
22 and 17535, Plaintiffs and the members of the California Subclass seek an order of this
23 Court enjoining Defendant from continuing to engage, use, or employ its practice of
24 labeling and advertising the sale and use of the Product. Likewise, Plaintiffs and the
25 members of the California Subclass seek an order requiring Defendant to disclose
26 such misrepresentations, and to preclude Defendant’s failure to disclose the existence
27 and significance of said misrepresentations.

28 78. **Causation/Damages.** As a direct and proximate result of Defendant’s

1 misconduct in violation of the UCL, Plaintiffs and members of the California Subclass
2 were harmed in the amount of the purchase price they paid for the Product. Further,
3 Plaintiffs and members of the California Subclass have suffered and continue to suffer
4 economic losses and other damages including, but not limited to, the amounts paid
5 for the Product, and any interest that would have accrued on those monies, in an
6 amount to be proven at trial. Accordingly, Plaintiffs seek a monetary award for
7 violation of the UCL in damages, restitution, and/or disgorgement of ill-gotten gains
8 to compensate Plaintiffs and the California Subclass for said monies, as well as
9 injunctive relief to enjoin Defendant’s misconduct to prevent ongoing and future harm
10 that will result.

11 **“Unfair” Prong**

12 79. **Unfair Standard.** Under the UCL, a challenged activity is “unfair” when
13 “any injury it causes outweighs any benefits provided to consumers and the injury is
14 one that the consumers themselves could not reasonably avoid.” *Camacho v. Auto*
15 *Club of Southern California*, 142 Cal. App. 4th 1394, 1403 (2006).

16 80. **Injury.** Defendant’s action of mislabeling the Product with the
17 Challenged Representations does not confer any benefit to consumers; rather, doing
18 so causes injuries to consumers, who do not receive products commensurate with their
19 reasonable expectations, overpay for the Product, and receive a product of lesser
20 standards than what they reasonably expected to receive. Consumers cannot avoid
21 any of the injuries caused by Defendant’s deceptive labeling and advertising of the
22 Product. Accordingly, the injuries caused by Defendant’s deceptive labeling and
23 advertising outweigh any benefits.

24 81. Defendant’s unfair conduct also includes its widespread violation of
25 Plaintiff’s and California Class Members’ rights to privacy, in the way Defendant
26 collects information, tracks consumers’ private and personal information, as well as
27 health information.

28 82. Reasonable consumers expect Defendant to comply with HIPPA

1 requirements given that Defendant handles consumers’ personal information.
2 Defendant’s actions do not confer any benefit to consumers; and consumers cannot
3 avoid these injuries – misuse of their personal data, and invasion of privacy.

4 83. **Balancing Test.** Some courts conduct a balancing test to decide if a
5 challenged activity amounts to unfair conduct under California Business and
6 Professions Code Section 17200. They “weigh the utility of the defendant’s conduct
7 against the gravity of the harm to the alleged victim.” *Davis v. HSBC Bank Nevada,*
8 *N.A.*, 691 F.3d 1152, 1169 (9th Cir. 2012).

9 84. **No Utility.** Here, Defendant’s conduct has no utility and financially
10 harms consumers. Thus, the utility of Defendant’s conduct is vastly outweighed by
11 the gravity of harm.

12 85. **Legislative Declared Policy.** Some courts require that “unfairness must
13 be tethered to some legislative declared policy or proof of some actual or threatened
14 impact on competition.” *Lozano v. AT&T Wireless Servs. Inc.*, 504 F. 3d 718, 735
15 (9th Cir. 2007).

16 86. **Unfair Conduct.** Defendant’s labeling and advertising of the Product, as
17 alleged herein, is false, deceptive, misleading, and unreasonable, and constitutes
18 unfair conduct. Similarly, Defendant’s collection and misuse of consumers personal
19 information, personal data, and health data, constitute unfair conduct. Defendant
20 knew or should have known of its unfair conduct. Defendant’s misrepresentations
21 constitute an unfair business practice within the meaning of California Business and
22 Professions Code Section 17200.

23 87. **Reasonably Available Alternatives.** There existed reasonably available
24 alternatives to further Defendant’s legitimate business interests, other than the
25 conduct described herein.

26 88. **Defendant’s Wrongful Conduct.** All of the conduct alleged herein
27 occurs and continues to occur in Defendant’s business. Defendant’s wrongful conduct
28 is part of a pattern or generalized course of conduct repeated on thousands of

1 occasions daily.

2 **“Fraudulent” Prong**

3 89. **Fraud Standard.** The UCL considers conduct fraudulent (and prohibits
4 said conduct) if it is likely to deceive members of the public. *Bank of the West v.*
5 *Superior Court*, 2 Cal. 4th 1254, 1267 (1992).

6 90. **Fraudulent & Material Challenged Representations.** Defendant
7 included the Challenged Representations with the intent to sell the Product to
8 consumers, including Plaintiffs and the California Subclass. The Challenged
9 Representations are false, and Defendant knew or should have known of their falsity.
10 The Challenged Representations are likely to deceive consumers into purchasing the
11 Product because they are material to the average, ordinary, and reasonable consumer.

12 91. **Fraudulent Business Practice.** As alleged herein, the misrepresentations
13 by Defendant constitute a fraudulent business practice in violation of California
14 Business & Professions Code Section 17200.

15 92. **Reasonable and Detrimental Reliance.** Plaintiffs and the California
16 Subclass reasonably and detrimentally relied on the material and false Challenged
17 Representations to their detriment in that they purchased the Product.

18 93. **Reasonably Available Alternatives.** Defendant had reasonably
19 available alternatives to further its legitimate business interests, other than the conduct
20 described herein.

21 94. **Business Practice.** All of the conduct alleged herein occurs and continues
22 to occur in Defendant’s business. Defendant’s wrongful conduct is part of a pattern
23 or generalized course of conduct.

24 **“Unlawful” Prong**

25 95. **Unlawful Standard.** The UCL identifies violations of other laws as
26 “unlawful practices that the unfair competition law makes independently actionable.”
27 *Velazquez v. GMAC Mortg. Corp.*, 605 F. Supp. 2d 1049, 1068 (C.D. Cal. 2008).

28 96. **Violations of CLRA and FAL.** Defendant’s labeling of the Products, as

1 alleged herein, violates California Civil Code sections 1750, *et seq.* (the “CLRA”) and
2 California Business and Professions Code sections 17500, *et seq.* (the “FAL”) as set
3 forth below in the sections regarding those causes of action.

4 **97. Additional Violations.** Defendant’s conduct in making the false
5 representations described herein constitutes a knowing failure to adopt policies in
6 accordance with and/or adherence to applicable laws, as set forth herein, all of which
7 are binding upon and burdensome to their competitors. This conduct engenders an
8 unfair competitive advantage for Defendant, thereby constituting an unfair, fraudulent
9 and/or unlawful business practice under California Business & Professions Code
10 sections 17200-17208. Additionally, Defendant’s conduct, tracking of consumers’
11 data (both personal and health information, geolocation, etc.) and misuse of such vast
12 variety of information (including sharing/disclosing such information to Meta
13 Platforms while consumers are purchasing/browsing Defendant’s website) violate
14 California Civil Code sections 1572, 1573, 1709, 1710, 1711, California Genetic
15 Privacy Act, Cal. Civ. Code § 56.18-56.186, and California Consumer Records Act,
16 Cal. Civ. Code § 1798.81.5(a)(1), HIPAA, Section 5 of the Federal Trade
17 Commission Act (“FTCA”), 15 U.S.C. § 45, and the California Consumer Privacy
18 Act, Cal. Civ. Code § 1798.100, *et seq.* as well as the common law.

19 **98. Unlawful Conduct.** Defendant’s packaging, labeling, and advertising of
20 the Product, as alleged herein, are false, deceptive, misleading, and unreasonable, and
21 constitute unlawful conduct. Similarly, Defendant’s collection of private information
22 and health information as fully discussed above, and misuse of this information, also
23 constitute unlawful conduct. Defendant knew or should have known of its unlawful
24 conduct.

25 **99. Reasonably Available Alternatives.** Defendant had reasonably
26 available alternatives to further its legitimate business interests, other than the conduct
27 described herein.

28 **100. Business Practice.** All of the conduct alleged herein occurs and continues

1 to occur in Defendant’s business. Defendant’s wrongful conduct is part of a pattern
2 or generalized course of conduct.

3 **COUNT TWO**

4 **Violation of California False Advertising Law**

5 **(Cal. Bus. & Prof. Code §§ 17500, *et seq.*)**

6 **(*On Behalf of the California Subclass*)**

7 101. **Incorporation by reference.** Plaintiffs re-allege and incorporate by
8 reference all allegations contained in this complaint, as though fully set forth herein.

9 102. **California Subclass.** Plaintiffs bring this claim individually and on
10 behalf of the California Subclass who purchased the Product within the applicable
11 statute of limitations.

12 103. **FAL Standard.** The False Advertising Law, codified at Cal. Bus. & Prof.
13 Code section 17500, *et seq.*, prohibits “unfair, deceptive, untrue or misleading
14 advertising[.]”

15 104. **False & Material Challenged Representations Disseminated to**
16 **Public.** Defendant violated section 17500 when it advertised and marketed the
17 Products through the unfair, deceptive, untrue, and misleading Challenged
18 Representations disseminated to the public through the Product’s labeling, packaging
19 and advertising. These representations were false because the Product does not
20 conform to them. The representations were material because they are likely to
21 mislead a reasonable consumer into purchasing the Product.

22 105. **Knowledge.** In making and disseminating the representations alleged
23 herein, Defendant knew or should have known that the representations were untrue
24 or misleading, and acted in violation of § 17500.

25 106. **Intent to sell.** Defendant’s Challenged Representations were specifically
26 designed to induce reasonable consumers, like Plaintiffs and the California Subclass,
27 to purchase the Product.

28 107. **Causation/Damages.** As a direct and proximate result of Defendant’s

1 misconduct in violation of the FAL, Plaintiffs and members of the California Subclass
 2 were harmed in the amount of the purchase price they paid for the Product. Further,
 3 Plaintiffs and members of the Class have suffered and continue to suffer economic
 4 losses and other damages including, but not limited to, the amounts paid for the
 5 Product, and any interest that would have accrued on those monies, in an amount to
 6 be proven at trial. Accordingly, Plaintiffs seek a monetary award for violation of the
 7 FAL in damages, restitution, and/or disgorgement of ill-gotten gains to compensate
 8 Plaintiffs and the California Subclass for said monies, as well as injunctive relief to
 9 enjoin Defendant’s misconduct to prevent ongoing and future harm that will result.

COUNT THREE

Violation of California Consumers Legal Remedies Act

(Cal. Civ. Code §§ 1750, *et seq.*)

(On Behalf of the California Subclass)

14 108. **Incorporation by Reference.** Plaintiffs re-allege and incorporate by
 15 reference all allegations contained in this complaint, as though fully set forth herein.

16 109. **California Subclass.** Plaintiffs bring this claim individually and on
 17 behalf of the California Subclass who purchased the Product within the applicable
 18 statute of limitations.

19 110. **CLRA Standard.** The CLRA provides that “unfair methods of
 20 competition and unfair or deceptive acts or practices . . . undertaken by any person in
 21 a transaction intended to result or which results in the sale or lease of goods or services
 22 to any consumer are unlawful.” Cal. Civ. Code § 1170(a).

23 111. **Goods/Services.** The Product is a “goods,” as defined by the CLRA in
 24 California Civil Code § 1761(a).

25 112. **Defendant.** Defendant is a “person,” as defined by the CLRA in
 26 California Civil Code § 1761(c).

27 113. **Consumers.** Plaintiffs and members of the California Subclass are
 28 “consumers,” as defined by the CLRA in California Civil Code § 1761(d).

1 114. **Transactions.** The purchase of the Product by Plaintiffs and members of
2 the California Subclass are “transactions” as defined by the CLRA under California
3 Civil Code section 1761(e).

4 115. **Violations of the CLRA.** Defendant violated the following sections of
5 the CLRA by selling the Product to Plaintiffs and the California Subclass through the
6 false, misleading, deceptive, and fraudulent Challenged Representations:

- 7 a. Section 1770(a)(5) by representing that the Product has “characteristics, .
8 . . . uses [or] benefits . . . which [it] do[es] not have.”
- 9 b. Section 1770(a)(7) by representing that the Product “[is] of a particular
10 standard, quality, or grade . . . [when it is] of another.”
- 11 c. Section 1770(a)(9) by advertising the Product “with [the] intent not to sell
12 [it] as advertised.”

13 116. **Knowledge.** Defendant’s uniform and material representations and
14 omissions regarding the Product were likely to deceive, and Defendant knew or
15 should have known that its representations and omissions were untrue and misleading.

16 117. **Malicious.** Defendant’s conduct is malicious, fraudulent, and wanton in
17 that Defendant intentionally misled and withheld material information from
18 consumers, including Plaintiffs, to increase the sale of the Product.

19 118. **Plaintiffs Could Not Have Avoided Injury.** Plaintiffs and members of
20 the California Subclass could not have reasonably avoided such injury. Plaintiffs and
21 members of the California Subclass were unaware of the existence of the facts that
22 Defendant suppressed and failed to disclose, and Plaintiffs and members of the
23 California Subclass would not have purchased the Product and/or would have
24 purchased it on different terms had they known the truth.

25 119. **Causation/Reliance/Materiality.** Plaintiffs and the California Subclass
26 suffered harm as a result of Defendant’s violations of the CLRA because they relied
27 on the Challenged Representations in deciding to purchase the Product. The
28 Challenged Representations were a substantial factor. The Challenged

1 Representations were material because a reasonable consumer would consider them
2 important in deciding whether to purchase the Product.

3 **120. Section 1782(d)—Prelitigation Demand/Notice.** Pursuant to California
4 Civil Code, section 1782, more than thirty days prior to the filing of this complaint,
5 on or about April 27, 2023, Plaintiffs’ counsel, acting on behalf of Plaintiffs and all
6 members of the Class, mailed a Demand Letter, via U.S. certified mail, return receipt
7 requested, addressed to Defendant at its headquarters and principal place of business.

8 **121. Causation/Damages.** As a direct and proximate result of Defendant’s
9 misconduct in violation of the CLRA, Plaintiffs and members of the California
10 Subclass were harmed in the amount of the purchase price they paid for the Product.
11 Further, Plaintiffs and members of the Class have suffered and continue to suffer
12 economic losses and other damages including, but not limited to, the amounts paid
13 for the Products, and any interest that would have accrued on those monies, in an
14 amount to be proven at trial. Accordingly, Plaintiffs seek a monetary award for
15 violation of this Act in the form of damages, restitution, disgorgement of ill-gotten
16 gains to compensate Plaintiffs and the California Subclass for said monies.

17 **122. Injunction.** Given that Defendant’s conduct violated California Civil
18 Code section 1780, Plaintiffs and members of the California Subclass are entitled to
19 seek, and do seek, injunctive relief to put an end to Defendant’s violations of the
20 CLRA and to dispel the public misperception fostered by Defendant’s false
21 advertising campaign. Plaintiffs have no adequate remedy at law. Without equitable
22 relief, Defendant’s unfair and deceptive practices will continue to harm Plaintiffs and
23 the California Subclass. Accordingly, Plaintiffs seek an injunction to enjoin
24 Defendant from continuing to employ the unlawful methods, acts, and practices
25 alleged herein pursuant to section 1780(a)(2), and otherwise require Defendant to take
26 corrective action necessary to dispel the public misperception facilitated through
27 Defendant’s deceptive labeling of the Product with the Challenged Representations.

28 **123. Punitive Damages.** Defendant’s unfair, fraudulent, and unlawful

1 conduct described herein constitutes malicious, oppressive, and/or fraudulent conduct
2 warranting an award of punitive damages as permitted by law. Defendant's
3 misconduct is malicious as Defendant acted with the intent to cause Plaintiffs and
4 consumers to pay for a Product they were not, in fact, receiving. Defendant willfully
5 and knowingly disregarded the rights of Plaintiffs and consumers as Defendant was,
6 at all times, aware of the probable dangerous consequences of its conduct and
7 deliberately failed to avoid misleading consumers, including Plaintiffs. Defendant's
8 misconduct is oppressive as, at all relevant times, said conduct was so vile, base,
9 and/or contemptible that reasonable people would look down upon it and/or otherwise
10 would despise such corporate misconduct. Said misconduct subjected Plaintiffs and
11 consumers to cruel and unjust hardship in knowing disregard of their rights.
12 Defendant's misconduct is fraudulent as Defendant, at all relevant times, intentionally
13 misrepresented and/or concealed material facts with the intent to deceive Plaintiffs
14 and consumers. The wrongful conduct constituting malice, oppression, and/or fraud
15 was committed, authorized, adopted, approved, and/or ratified by officers, directors,
16 and/or managing agents of Defendant. Accordingly, Plaintiffs seek an award of
17 punitive damages against Defendant.

18 **COUNT FOUR**

19 **Violation of the Confidentiality of Medical Information Act**

20 **(Cal. Civ. Code §§ 56, *et seq.*)**

21 ***(On Behalf of the California Subclass)***

22 124. Plaintiffs re-allege and incorporate by reference all allegations contained
23 in this complaint, as though fully set forth herein.

24 125. Defendant is subject to the Confidentiality of Medical Information Act
25 (CMIA) pursuant to California Civil Code § 56.10 because it is a "provider of health
26 care" as defined by California Civil Code § 56.05(o) in that it provides health care
27 services and maintains medical information from consumers.

28 126. Section 56.10(a) provides, in pertinent part, that "[a] provider of health

1 care, . . . shall not disclose medical information regarding a patient of the provider of
2 health care . . . without first obtaining an authorization”

3 127. Section 56.101 of the CMIA provides, in pertinent part, that “[a]ny
4 provider of health care . . . who negligently creates, maintains, preserves, stores,
5 abandons, destroys, or disposes of medical information shall be subject to the
6 remedies and penalties” Cal. Civ. Code §§ 56.10, 56.101.

7 128. Plaintiffs’ and California Subclass members’ private information
8 constitutes “medical information” under the CMIA because it consists of individually
9 identifiable information in possession of and derived from a provider of healthcare
10 regarding Plaintiffs’ and California Subclass members’ medical histories, test results,
11 mental or physical conditions, and/or treatments.

12 129. Defendant violated Cal. Civ. Code § 56.10 because it failed to maintain
13 the confidentiality of users’ medical information, and instead “disclose[d] medical
14 information regarding a patient of the provider of health care or an enrollee or
15 subscriber of a health care service plan without first obtaining an authorization” by
16 soliciting, intercepting, and receiving Plaintiffs’ and California Subclass members’
17 private information, and sharing it with advertisers and for advertising purposes.

18 130. Defendant violated Cal. Civ. Code § 56.101 because it knowingly,
19 willfully, or negligently failed to create, maintain, preserve, store, abandon, destroy,
20 and dispose of medical information in a manner that preserved its confidentiality by
21 soliciting, intercepting, and receiving Plaintiffs’ and California Subclass members’
22 private information, and sharing it with advertisers and for advertising purposes, and
23 for Defendant’s financial gain.

24 131. Defendant violated Cal Civ. Code § 56.36(b) because it negligently
25 released or otherwise allowed access to confidential information and records
26 concerning Plaintiffs and California Subclass members in violation of their rights
27 under the CMIA.

28 132. As a direct and proximate result of Defendant’s misconduct, Plaintiffs

1 and California Subclass members had their private communications containing
2 information related to their sensitive and confidential private information intercepted,
3 disclosed, and used by third parties.

4 133. As a result of Defendant’s unlawful conduct, Plaintiffs and the California
5 Subclass members suffered an injury, including violation to their rights of privacy,
6 loss of the privacy of their private information, loss of control over their sensitive
7 personal information, and suffered aggravation, inconvenience, and emotional
8 distress.

9 134. Plaintiffs and California Subclass members are entitled to: (a) nominal
10 damages of \$1,000 per violation; (b) actual damages, in an amount to be determined
11 at trial; (c) reasonable attorneys’ fees, and costs.

12 **COUNT FIVE**

13 **Breach of Warranty**

14 ***(On Behalf of the Class)***

15 135. **Incorporation by Reference.** Plaintiffs re-allege and incorporate by
16 reference all allegations contained in this complaint, as though fully set forth herein.

17 136. **Nationwide Class & California Subclass.** Plaintiffs bring this claim
18 individually and on behalf of the Nationwide Class and California Subclass (the
19 Class) who purchased the Product within the applicable statute of limitations.

20 137. **Express Warranty.** By advertising and selling the Product at issue,
21 Defendant made promises and affirmations of fact on the Product’s packaging and
22 labeling, and through its marketing and advertising, as described herein. This labeling
23 and advertising constitute express warranties and became part of the basis of the
24 bargain between Plaintiffs and members of the Class and Defendant. Defendant
25 purports, through the Product’s labeling and advertising, to create express warranties
26 that the Product, among other things, conforms to the Challenged Representations.

27 138. **Implied Warranty of Merchantability.** By advertising and selling the
28 Product at issue, Defendant, a merchant of goods, made promises and affirmations of

1 fact that the Product is merchantable and conforms to the promises or affirmations of
2 fact made on the Product's packaging and labeling, and through its marketing and
3 advertising, as described herein. This labeling and advertising, combined with the
4 implied warranty of merchantability, constitute warranties that became part of the
5 basis of the bargain between Plaintiffs and members of the Class and Defendant—to
6 wit, that the Product, among other things, conforms to the Challenged
7 Representations.

8 139. **Breach of Warranty.** Contrary to Defendant's warranties, the Product
9 does not conform to the Challenged Representations and, therefore, Defendant
10 breached its warranties about the Product.

11 140. **Causation/Remedies.** As a direct and proximate result of Defendant's
12 breach of warranty, Plaintiffs and members of the Class were harmed in the amount
13 of the purchase price they paid for the Product. Further, Plaintiffs and members of the
14 Class have suffered and continue to suffer economic losses and other damages
15 including, but not limited to, the amounts paid for the Products, and any interest that
16 would have accrued on those monies, in an amount to be proven at trial. Accordingly,
17 Plaintiffs seek a monetary award for breach of warranty in the form of damages,
18 restitution, or disgorgement of ill-gotten gains to compensate Plaintiffs and the Class
19 for said monies, as well as injunctive relief to enjoin Defendant's misconduct to
20 prevent ongoing and future harm that will result.

21 **COUNT SIX**

22 **Unjust Enrichment/Restitution**

23 ***(On Behalf of the Class)***

24 141. **Incorporation by Reference.** Plaintiffs re-allege and incorporate by
25 reference all allegations contained in this complaint, as though fully set forth herein.

26 142. **Nationwide Class & California Subclass.** Plaintiffs bring this claim
27 individually and on behalf of the Nationwide Class and California Subclass (the
28 Class) who purchased the Product within the applicable statute of limitations.

1 Class) who purchased the Product within the applicable statute of limitations.

2 149. **Misrepresentation.** Defendant fraudulently and deceptively informed
3 Plaintiffs and Class members that Defendant's Product could identify food
4 sensitivities, while intentionally omitting material information IgG cannot test for
5 food sensitivities as advertised.

6 150. **Knowledge of Falsity.** These misrepresentations and omissions were
7 known exclusively to, and actively concealed by, Defendant, not reasonably known
8 or knowable to Plaintiffs, and material at the time they were made. Defendant
9 intended to deceive consumers through its Product packaging and advertising as to its
10 ability to identify food sensitivities, when Defendant knew its Product had no such
11 functionality or medical/health benefit whatsoever. Defendant intentionally,
12 knowingly, and recklessly made these misrepresentations to induce Plaintiffs to
13 purchase the Product and provide personal and private consumer information.
14 Defendant thereby allowed its packaging, labels, advertisements, promotional
15 materials, and websites to intentionally mislead consumers, such as Plaintiffs.

16 151. **Justifiable Reliance.** Plaintiffs did in fact rely on these
17 misrepresentations and omissions and purchased the Product and provided their
18 private consumer information to their detriment. Given the deceptive manner in which
19 Defendant advertised, represented, and otherwise promoted the Product, Plaintiffs'
20 reliance on Defendant's misrepresentations was justifiable. Defendant's
21 misrepresentations and omissions concerned material facts that were essential to the
22 analysis undertaken by Plaintiffs as to whether to purchase the Product and provide
23 personal and private consumer information. In misleading Plaintiffs, Defendant
24 breached its duty to them, and gained financially from and as a result of this breach
25 of duty.

26 152. **Causation/Damages.** As a direct and proximate result of Defendant's
27 conduct, Plaintiffs have suffered actual damages in that they have purchased Product
28 that are useless, or at a minimum, worth less than the price they paid, and that they

1 would not have purchased at all had they known the truth. They have also suffered
2 actual damages from providing to Defendant their personal and private consumer
3 information. Accordingly, Plaintiffs seek actual damages, injunctive and declaratory
4 relief, attorneys' fees, costs, and any other just and proper relief available.

5 **COUNT EIGHT**

6 **Negligent Misrepresentation**

7 ***(On Behalf of the Class)***

8 153. **Incorporation by Reference.** Plaintiffs re-allege and incorporate by
9 reference all allegations contained in this complaint, as though fully set forth herein.

10 154. **Nationwide Class & California Subclass.** Plaintiffs bring this claim
11 individually and on behalf of the Nationwide Class and California Subclass (the
12 Class) who purchased the Product within the applicable statute of limitations.

13 155. **Duty.** Defendant had a duty to Plaintiffs to exercise reasonable and
14 ordinary care in the formulation, testing, manufacturing, marketing, distribution, and
15 sale of the Product and acquisition of personal and private consumer information.

16 156. **Breach of Duty.** Defendant breached its duty to Plaintiffs by
17 formulating, testing, manufacturing, advertising, marketing, distributing, and selling
18 a Product that does not work as advertised and by asserting a right of ownership and
19 control over the personal and private consumer information. Defendant knew or
20 should have known the Product was not suitable for its intended use and was
21 otherwise not as warranted and represented by Defendant.

22 157. **Injury.** As a direct and proximate result of Defendant's conduct,
23 Plaintiffs have suffered actual damages in that they have purchased a Product that is
24 useless, or at a minimum, worth less than the price they paid, and that they would not
25 have purchased the Product at all had they known the truth. They have also suffered
26 actual damages from providing to Defendant their personal and private consumer
27 information. Accordingly, Plaintiffs seek actual damages, injunctive and declaratory
28 relief, attorneys' fees, costs, and any other just and proper relief available.

1 **PRAYER FOR RELIEF**

2 Plaintiffs, individually and on behalf of all others similarly situated, pray for
3 judgment against Defendant as follows:

- 4 a. **Certification:** For an order certifying this action as a class action,
5 appointing Plaintiffs as the class representatives, and appointing
6 Plaintiffs’ counsel as class counsel;
- 7 b. **Declaratory Relief:** For an order declaring that Defendant’s conduct
8 violates the statutes and laws referenced herein;
- 9 c. **Injunction:** For an order requiring Defendant to immediately cease and
10 desist from selling the unlawful Product; enjoining Defendant from
11 continuing to market, advertise, distribute, and sell the Product in the
12 unlawful manner described herein; compelling Defendant to clearly
13 disclose, inform, and obtain affirmative consent from consumers
14 regarding its collection, use, and sharing of consumers’ personal data as
15 described herein; requiring Defendant to engage in an affirmative
16 advertising campaign to dispel the public misperception of the Product
17 resulting from Defendant’s unlawful conduct; and requiring all further
18 and just corrective action, consistent with permissible law and pursuant
19 to only those causes of action so permitted;
- 20 d. **Damages/Restitution/Disgorgement:** For an order awarding monetary
21 compensation in the form of damages, restitution, and/or disgorgement to
22 Plaintiffs and the Class, consistent with permissible law and pursuant to
23 only those causes of action so permitted;
- 24 e. **Punitive Damages/Penalties:** For an order awarding punitive damages,
25 statutory penalties, and/or monetary fines, consistent with permissible
26 law and pursuant to only those causes of action so permitted;
- 27 f. **Attorneys’ Fees & Costs:** For an order awarding attorneys’ fees and
28 costs, consistent with permissible law and pursuant to only those causes

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of action so permitted;

g. **Pre/Post-Judgment Interest:** For an order awarding pre-judgment and post-judgment interest, consistent with permissible law and pursuant to only those causes of action so permitted; and

h. **All Just & Proper Relief:** For such other and further relief as the Court deems just and proper.

DEMAND FOR JURY TRIAL

Plaintiffs hereby demand a trial by jury on all issues and causes of action so triable.

DATED: June 8, 2023

Respectfully submitted,

CLARKSON LAW FIRM, P.C.

By: /s/ Bahar Sodaify
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Attorneys for Plaintiffs